Supreme Court of the United States

OCTOBER TERM, 1921

No. 236

UNION TRUST COMPANY OF SAN FRANCISCO and ALBERT LACHMAN, AS EXECUTORS OF HENRIETTE S. LACHMAN, DECEASED,

Plaintiffs-in-error,

v.

JUSTUS S. WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, ET AL.,

Defendants-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF ON BEHALF OF THE PLAINTIFFS-IN-ERROR.

WILLIAM D. GUTHRIE,
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E. S. HELLER,
ISAAC FROHMAN,
BERNARD HERSHKOPF,
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Union Trust Company of San Francisco and Albert Lachman, as executors of Henriette S. Lachman, deceased,

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Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, et al.,

Defendants-in-error.

In error to the District Court of the United States for the Northern District of California.

BRIEF ON BEHALF OF THE PLAINTIFFS-IN-ERROR.

The present writ of error brings before the court for review a judgment in favor of the defendant Collector of Internal Revenue rendered upon the failure of the plaintiffs to plead over after the court below had sustained a demurrer to the amended complaint in an action to recover a tax alleged to have been illegally and unconstitutionally imposed and collected (pp. 1-12). The

tax involved is one purporting to be levied under the authority of the Federal Estate Tax Law of September 8, 1916 (39 Stat. 777), which the plaintiffs contend is not applicable to the case at bar when properly construed, or, if applicable, is unconstitutional because the transfer to which the tax in question relates was irrevocably made and completed in 1901, more than fifteen years prior to the passage of the taxing act. The court below overruled these contentions. Its opinion is reported in 273 Fed. 733, and is printed at pp. 15-6 of the record.

Statement.

In May, 1901, Henriette S. Lachman was the owner of 7,475 shares of the capital stock of the S. & H. Lachman Estate, a California corporation. On May 31st of that year she executed and delivered to her two sons, Albert and Henry, a deed or declaration of trust in respect of this stock (pp. 2-3). By this instrument, she irrevocably transferred to them as trustees the stock in question, upon trust to pay to her the income therefrom for life, and at her death to deliver 2,490 shares of the stock to her son Henry and 2,495 shares to her son Albert, as their respective absolute property. The remaining 2,490 shares she directed the said trustees to hold after her death in further trust for her daughter, Rebecca Metzger, to pay the income therefrom to the said daughter and, upon the death of the latter, to apply the said income for the benefit of the daughter's children until the youngest became of age, when the 2,490 shares were directed to be equally divided

among the then surviving grandchildren (pp. 2-3). The share certificates were thereupon in May, 1901, immediately upon the execution and delivery of the deed of trust, endorsed and delivered to the trustees (p. 3).

The creator of the trust, the trustees and all the *cestui que trustent* were at all the times material in the case at bar residents of the State of California, and the property involved in the trust was within that state and consisted of the stock of a corporation organized under the laws of that state (p. 3). The property rights and interests of the parties herein are, therefore, controlled by the law of California. Under that law, it is indisputable that the execution and delivery of the deed or declaration of trust on May 31, 1901, operated on that day immediately and irrevocably to divest the transferor of all right, title and interest in the 7,475 shares of stock, except to the extent of the equitable life estate reserved by her. The transfer, followed by immediate and unconditional delivery as aforesaid, was complete and perfect in 1901 and beyond the power of Henriette Lachman, the transferor, thereafter to alter or affect in any manner.

By the settled law of California the transfer of 1901 at once vested the following interests, namely:

(1) In Henriette Lachman an equitable life interest, which would terminate and be extinguished upon her death;

(2) In Henry and Albert Lachman, respectively, a vested and indefeasible remainder;

(3) In Rebecca Metzger a vested equitable life estate upon the death of her mother, and

(4) In the children of Rebecca Metzger a vested and defeasible remainder; defeasible, however, not because of any reserved power or authority in Henriette Lachman (for there was none), but only because, being a gift to a class, the gift was subject to open and let in any after-born grandchildren or be divested by the death of some of the grandchildren before the termination of the life estates. *Gray* v. *Union Trust Co.*, 171 Cal. 637, 642; *Estate of Murphy*, 182 Cal. 740, 743; Cal. Civil Code, secs. 693 and 694.

It will be noted that under the local law, which governs the situation, although Henriette Lachman had reserved to herself for life the income arising from the shares of stock transferred, nevertheless, the future interests—the remainders—created by the transfer were all irrevocably vested in the donees on the day the transfer was made, namely, on May 31, 1901.

After the trust had continued for thirteen years, and on July 13, 1914, the daughter of Mrs. Lachman, Rebecca Metzger, died (p. 4). She was survived by three children—Elsa Metzger Davis, Vera Metzger Davis and Samuel Metzger—remaindermen under the deed or declaration of trust, all of whom had been born prior to May 31, 1901, when the trust was created (*id.*). The youngest of these grandchildren, Samuel, attained his majority on September 19, 1916 (*id.*).

About a year after the death of the daughter, Mrs. Metzger, one of the sons, Henry Lachman, died on July 10, 1915 (p. 3). He left a will in which he bequeathed his estate to his mother, and thereupon there was re-vested in her the remainder interest which she had previously

given him in the 2,490 shares of the Lachman Estate stock above referred to (pp. 3-4).

Thereafter on November 14, 1916, Henriette S. Lachman, the donor, died leaving a last will and testament and an estate of about $300,000 (p. 4). Her life interest in the Lachman Estate stock was thus extinguished (*Commonwealth* v. *McCauley's Executors,* 166 Ky. 450, 452), and, as the trust thus came to an end, the surviving trustee, Albert Lachman, distributed the shares, taking 2,495 shares for himself and giving 2,490 to the three grandchildren; and none of these 4,985 shares ever became part of Henriette Lachman's estate (pp. 4-5).

Mrs. Lachman's will was thereafter probated, and a tax under the Federal Estate Tax Law of September 8, 1916, paid in respect of the transfer of all the property which passed at her death under her will (pp. 4, 5). No tax, however, was paid upon the transfer of the 4,985 shares of S. & H. Lachman Estate stock which the testatrix had made in May, 1901, more than fifteen years before, and which she had not owned since then and which belonged to her surviving son, Henry, and her grandchildren (p. 5). Thereupon, the Commissioner of Internal Revenue ruled that the value of these shares at the time of the death of Mrs. Lachman should have been returned as part of her gross estate for purposes of taxation under the Estate Tax Law of September 8, 1916, and assessed against the plaintiffs, the executors of Mrs. Lachman's estate (p. 1), an additional tax in respect thereof to the amount of $4,545.50, which the plaintiffs paid to the defendant Collector of Internal Revenue under protest in due form (pp. 5-8).

The plaintiff executors thereafter appealed to the Commissioner of Internal Revenue for a refund of the tax thus collected, but he denied their application (p. 8), and they thereupon commenced this action to recover the amount paid under protest as aforesaid.

On May 31, 1901, when the transfer in suit was made, there was no law in force in California which imposed any transfer, inheritance, or other tax upon transfers to lineal descendants (such as are the parties here involved), whether or not such transfers had been made in contemplation of death, or whether or not they had been intended to take effect in possession or enjoyment at or after the death of the donor (pp. 8-9). In the case at bar, it is the fact that the transfer of 1901 was not made in contemplation of death, nor with any intent or purpose that it should not take effect at once, and the trustees then took over the shares of stock and entered into the possession thereof (p. 9).

It is the established law of the State of California that, although property may have been transferred in contemplation of death or to take effect in possession or enjoyment at or after death, the transfer, nevertheless, creates vested property rights in the transferee which no subsequent transfer tax law can impair or affect. *Hunt* v. *Wicht*, 174 Cal. 205. It is clear, therefore, that there is not now before the court a case in which the testatrix can in any just sense be charged with having made a transfer in order to evade taxation in any jurisdiction. The decedent's estate has, therefore, been subjected to taxation in respect of property which she ceased to own more than fifteen years before her death and over fifteen years before the taxing act was passed, and has

been so taxed at a rate based upon the value of such property, not at the time when she transferred it or owned it, but at the time of her death, when its value may have been substantially greater. The record, however, does not show the actual value in 1901.

To a complaint alleging in substance the facts above stated (pp. 1-10), the defendant collector interposed a demurrer upon the ground that it did not state a cause of action (pp. 10-11). This demurrer was sustained (p. 11); and the plaintiffs having declined to plead over, the court below gave judgment against them (pp. 11-2). The district judge (p. 16) deemed himself bound by the decision of the Circuit Court of Appeal of the Sixth Circuit in *Shwab* v. *Doyle*, 269 Fed. 321, which is now pending undetermined in this court (October Term, 1921, No. 200).

THE ASSIGNMENTS OF ERROR AND STATEMENT OF THE NATURE OF THE CONTENTIONS OF THE PLAINTIFFS-IN-ERROR.

The assignments of error (pp. 18-20) may be briefly summarized as asserting (1) that the Estate Tax Act of September 8, 1916, properly construed, does not apply to transfers made long prior to its passage, whether such transfers were in contemplation of death, or created future interests to come into possession or enjoyment at or after the transferor's death, and (2) that, if construed to apply to such past transfers, the act would be unconstitutional.

The plaintiffs-in-error do not challenge either the applicability or constitutionality of the act in so far as it is applicable to transfers made subsequent to its enactment. Those questions are no longer open in this

court. *New York Trust Co.* v. *Eisner*, 256 U. S. 345. But the retroactive operation of the law and its validity if it does operate retroactively, are herein called into question. This court has not yet determined these questions.

No principle is more firmly imbedded in our law than that special tax impositions are not to be construed retroactively, nor so as to interfere with consummated acts, antecedent rights, past relations and vested interests, unless the language of the enactment clearly and unambiguously compels such a construction. There is no such language in the statute now before the court. Indeed, Congress saw fit in the act of September 8, 1916, to select and employ language different from that of the act of 1864 which this court had held to be retroactive in effect and meaning. Instead of re-adopting the earlier phraseology, Congress deliberately, and presumably intentionally, adopted taxing formulae long in use in state legislation, which the state courts, upon the fullest and most deliberate consideration and with singular unanimity, had declared prospective only. Moreover, Congress has itself placed upon the statute the prospective construction herein urged, for it subsequently deemed it necessary so to amend the law in and by the act of February 24, 1919, as to make its provisions apply retroactively. Subdivision b of section 202 of the act of September 8, 1916 (39 Stat. 777), which governs the case at bar, and the corresponding subdivision c of section 402 of the amendatory act of February 24, 1919 (40 Stat. 1057), are printed below in parallel columns (the new matter added by the 1919 act being underscored):

Act of September 8, 1916	Act of February 24, 1919
"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth." ...	"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth." ...

Although it is the settled rule that taxing acts are to be interpreted, if doubtful, in favor of the citizen (*Gould* v. *Gould*, 245 U. S. 151, 153; *United States* v. *Field*, 255 U. S. 257, 262), in the case at bar, that principle has thus far been ignored. The decision of the Circuit Court of Appeals by which the trial judge felt himself bound (*Shwab* v. *Doyle*, 269 Fed. 321), declares that although "it is true that if the tax before us is retroactive it might, at least theoretically, affect conveyances made many years before a grantor's death", yet "this consideration", that decision asserts, "is hardly practical" (p. 326). Nevertheless, the transfer now before the court for consideration occurred more than fifteen years before the death of the donor or the enactment of the law, and the Commissioner of Internal Revenue has ruled that the statute is applicable to transfers made "at any time whatsoever

prior to September 8, 1916" (T. D. No. 2,385). While it was suggested in Congress in opposition to this tax that the law would cloud "every title that is transferred *after* the passage of this act" (53 Cong. Rec. 10,729), no one appears to have supposed that it would have any operation in respect of transfers made long *prior* to the passage of the act.

The court below also disregarded the principle of statutory interpretation which requires that, if reasonably possible, a meaning shall be given to a tax law which will not operate unreasonably or oppressively or to impair vested rights or disturb past transactions. A donor who had irrevocably given away an interest in property long before the act of September 8, 1916, and when no one had reason even to contemplate its enactment, may now find it impossible to make suitable, or even any, provision for his wife and children, if the interest thus previously transferred has considerably appreciated in value. Its value at the time of the donor's death, despite the fact that he has not owned or enjoyed it at any time since he parted therewith long before, is the measure of the tax which the donor's estate must now pay. In this manner, the donor is helpless to prevent the depletion of his remaining estate because, in the past, when the law in suit was not even dreamed of, he had given away a piece of land on which ore or oil has since been discovered, and discovered it may be even long after his donee has also parted with it.* Other

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* The hardship which may be worked by appreciation in value after the date of gift, will be realized if it be borne in mind how property has risen in value in many parts of the country. Thus, in California, where the case at bar originated, the public records and assessment rolls show the following striking examples:

illustrations will readily occur to the mind where injustice is done by taxing a transfer long after it is an accomplished fact and when the transferor is no longer in a position to make an election in respect thereto and powerless to undo it or re-adjust his or her affairs. It must needs be obvious that such a tax is quite different in character from a transfer tax which operates prospectively only. The transferor then has a choice. He may refrain from making the transfer. He need not exercise the right or privilege of transfer. He has the situation before him, and he must be deemed to realize the cost of his acts. A prospective construction would operate justly; but, it is submitted, a retroactive interpretation would as clearly operate unjustly and oppressively, and should, in consequence, be adopted by a court only when the plainest language constrains to that result. The words of the statute now in question, it is submitted, contain no such language.

In view of the repeated decisions of this court, it should be no longer open to argument that statutes ought not to be construed so as to raise serious doubt of their constitutionality, and that, for the purposes of this canon

Land	*1918 Valuation*	*1919 Valuation*	*1920 Valuation*	*1921 Valuation*
640 acres known as the Tupman tract (Sec. 36, T. 30 S. R. 24 E.—Kern County, Cal.)..	3,200	3,520	960,000	11,518,855
480 acres known as the Hay tract (W. ½ & W. ½ E. ½, Sec. 36, T. 30 S. R. 23 E.—Kern County, Cal.)..	12,000	12,000	720,000	1,653,110
159 acres known as the Carman tract (Lots 5-8, 11 & 12, Sec. 36, T. 30 S. R. 23 E.—Kern County, Cal.)..	......	39,750	238,500	1,084,965

of statutory interpretation it is not necessary for the court first to rule the unconstitutionality of an act and then to avoid the result by construction. Reasonable doubt, not actual decision of the constitutional question, is all that is required. In the case at bar, as is shown in a subsequent point, this rule is more than met. Thus, the most cursory perusal of the statute will disclose that it is intended to be a transfer tax. It is expressly imposed upon "the *transfer* of the net estate of the decedent" (sec. 201), and references therein to *transfer* as the event or occasion taxed are numerous and clear. It is, therefore, clearly a tax upon the transfer. For the protection accorded by the law to the act of transfer, for the privilege of transfer, the impost is laid. But where the transfer is past, where the privilege or property right of transfer has been exercised, where the act is wholly past, there is no longer any room for an excise tax in respect of the doing of any act or the exercise of any right or privilege. The transferor is not now seeking to do any act or exercise any right or privilege. The transferee is not now seeking or receiving any benefit or property by virtue of a transfer. The transferor now has nothing to transfer, and the transferee now has nothing but present ownership based wholly upon a past transfer.

If this statute be retroactive and, as such, constitutional, then every past transfer of every kind would be liable to taxation; and would be taxable, not only as against any one who had at any time in the past transferred property by sale or gift, but also as against any one who had bought or received it. Vested rights and long closed transactions may be thus disturbed and impaired.

Past profits and benefits may thus be converted into actual losses and disadvantages. The income of sales upon which income or direct taxes have been paid as for net profits or gains, may thus be subsequently transmuted into actual losses by an alleged excise tax for or upon the long past privilege or event of transfer or sale. As nearly all property has heretofore been acquired under some form of transfer, the power to tax past transfers would involve the power to reach all property by the most direct method of taxation. Such taxation, if it be an exercise of the taxing power at all, would have, in substance and practical effect, all the elements and incidents of a direct tax upon ownership as such, and would not be, in its nature and effect, an excise at all.

Many decisions in the state courts have recognized the essential character of a tax upon a past transfer, and have, therefore, held a retroactive transfer tax to be, not a privilege tax, for it clearly falls upon no right or privilege which the state can any longer either give, regulate or withhold, but in practical effect a direct or property tax, which attempts to take property without any consideration or justification and, therefore, without due process of law. These adjudications, quite aside from what they rule concerning limitations upon the taxing power of the several states, rest upon the fundamental conception that a tax upon a past transfer is in reality a tax upon past or present ownership of property as such and, therefore, in no proper sense, an excise at all, but a direct property tax.

I.

As to the provisions of the Estate Tax Act of September 8, 1916, and its legislative history.

The Estate Tax Act of September 8, 1916, which is embraced in sections 200 to 212 of title II of the Revenue Act of 1916 (39 Stat. 777), is printed in full in the appendix to this brief.

By section 201 "a tax . . . equal to the following percentages of the value of the net estate" is "imposed upon the *transfer* of the net estate of every decedent dying after the passage of this Act." The "gross estate", for the purposes of the tax, is then defined in section 202, in the following language:

> "The value of the gross estate of the decedent shall be determined by including the value *at the time of his death* of all property, real or personal, tangible or intangible, wherever situated:
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.
>
> (b) To the extent of any interest therein of which the decedent has at any time made a *transfer*, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a *bona fide* sale for a fair consideration in money or money's worth. . . .
>
> (c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally be-

> longed to such other person and never to have belonged to the decedent."

It is also declared in subdivision b of section 202, as a rule of evidence upon the subject, that—

> "Any *transfer* of a material part of his [i. e., the decedent's] property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideraton [i. e., 'money or money's worth'], shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title".

Section 203 enumerates the deductions to be made from the "gross estate" in order to arrive at the "net estate". For the purposes in hand it may be sufficient to note that, in the case of resident decedents, these are (1) funeral and administration expenses, claims against the estate, etc., and (2) a specific exemption of $50,000.

The tax is due one year after the decedent's death (sec. 204), and is to be paid by his executor (sec. 207). If not paid, it is the duty of the Collector of Internal Revenue to institute proceedings "to subject the property of the decedent to be sold under the judgment or decree of the court", and thus procure payment of the tax, together with costs and expenses (sec. 208). By section 209 it is provided that—

> "Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien."

And in the same section it is further provided that—

> "If the decedent makes a *transfer* of, or creates

> a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a *bona fide* sale for a fair consideration in money or money's worth) and if *the tax in respect thereto* is not paid when due, the *transferee* or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such *transfer*, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such *transferee* or trustee to a *bona fide* purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such *transferee* or trustee, except any part sold to a *bona fide* purchaser for a fair consideration in money or money's worth."

The Treasury Department has ruled concerning the tax above summarized, that—

> "This is not an inheritance tax, and the interests of separate beneficiaries and the manner of their taking have no bearing upon the question of liability to tax or the amount of the tax due. *This is a transfer tax*" (Treas. Reg., No. 37, revised to May, 1917, art. IV).

The Ways and Means Committee of the House of Representatives similarly reported that they "deemed it advisable to recommend a federal estate tax upon the *transfer* of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees" (Report No. 922, 64th Congress, 1st session, p. 5).

It is, therefore, manifest from the above, as well as from the language of the act, that the tax in suit was not intended to be an inheritance tax upon the respective distributive shares which pass at or because of death, as was the tax of 1898 involved in *Knowlton* v. *Moore*, 178 U. S.

41, but an estate transfer tax, as has been pointed out in several state cases (*Matter of Hamlin*, 226 N. Y. 407; *Matter of Sherman*, 179 N. Y. App. Div. 497; *Plunkett* v. *Old Colony Trust Co.*, 124 N. E. 265 [Mass.]). It is also manifest that it is a transfer tax, and, as such alone, was its validity as an excise or indirect tax sustained by this court, so far as the tax operated prospectively, in the recent case of *New York Trust Co.* v. *Eisner*, 256 U. S. 345.

In the act of September 8, 1916, Congress not only varied the language of prior federal tax laws in order to create an estate transfer tax, but it also refrained from using language in prior kindred federal tax laws which was plainly retroactive. Thus, the retroactive provisions of the act of June 30, 1864 (13 Stat. 287), were not adopted or followed. Section 127 of that statute expressly provided that—

> "*Every past or future disposition of real estate*, by will, deed or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passage of this act, shall be deemed to confer on the person entitled by reason of such disposition a 'succession',"

and section 133 thereof imposed a tax "in respect of every such succession as aforesaid" payable by the transferee. That act was plainly retroactive. It expressly applied to "every *past* or future disposition of real property", and hence this court so ruled as a matter of statutory construction in *Wright* v. *Blakeslee*, 101 U. S. 174. But in framing the act of September 8, 1916, Congress avoided the language of the act of 1864, presumably, if not indeed manifestly, because a different purpose, intent and operation were in mind.

The subsequent history of the legislation in suit confirms this view. In 1919 Congress was in search of new sources of revenue wherewith to meet the unprecedented needs of the nation accruing from the World War. It, therefore, revised the act of September 8, 1916, by adding thereto various new matters which extended and broadened the range of taxability thereunder, and to that end it passed the so-called "Revenue Act of 1918," approved by the President on February 24, 1919 (40 Stat. 1057). As above stated, section 402 of this last-mentioned act corresponds with section 202 of the act in suit, and defines the "gross estate" of the decedent for the purposes of the tax. It provides in part that in determining the gross estate of a decedent there shall be included, among other items, "the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated"—

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has *at any time* created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this Act*)," etc.

The new matter then added by Congress is italicized. It was plainly intended to be retroactive, and, it is submitted, was presumably added in order to change the law and to make that taxable which theretofore had not been. As was said in reference to another statute by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Bashaw*, 50 Fed. 749, 753-4:

> "The natural presumption is that the phraseology of the statute was changed in order to change

its meaning. The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act".

This court has applied this rule of statutory construction to the very same taxing acts as are now before the court. In the recent case of *United States* v. *Field*, 255 U. S. 257, 264-5, referring to another clause similarly inserted in the act of Congress of September 8, 1916, by the act of February 24, 1919, Mr. Justice Pitney declared that "its insertion indicates that Congress at least was doubtful whether the previous act included property passing by appointment"; and, accordingly, it was then held that the exercise of a power of appointment was not taxable under the earlier law. See also *Smietanka* v. *First Trust & Savings Bank*, Oct. Term, 1921, No. 540, decided February 27, 1922; *Ebersole* v. *McGrath*, 271 Fed. 995, 1001, and *United States* v. *Woodruff*, 175 Fed. 776, 777.

If, therefore, "Congress at least was doubtful whether the previous act" applied to or taxed past transfers, it would seem to be too plain for argument that such transfers should not be taxed thereunder. It is the settled rule of this court that—

> "Words in a statute ought not to have a retrospective application unless they are so clear, strong, and imperative, that no other meaning can be annexed to them" (*United States* v. *Heth*, 3 Cranch 399, 413).*

* See, also, *Reynolds* v. *McArthur*, 2 Pet. 417, 434; *Chew Heong* v. *United States*, 112 U. S. 536, 559; *United States* v. *Burr*, 159 U. S. 78, 82; *United States* v. *American Sugar Refining Co.*, 202 U. S. 563, 577; *Union Pacific R. R. Co.* v. *Snow*, 231 U. S. 204, 213.

And where Congress is itself at least in doubt as to the scope and effect of its own language, it is submitted that no court should hold that this language can, nevertheless, be regarded as "so clear, strong, and imperative, that no other meaning can be annexed to it" than that which would give it a retroactive operation. Certainly any such view would violate the long established canon of statutory interpretation which forbids the extension of taxing acts by implication (and particularly of special taxing acts like that herein in question) to the detriment of the individual. *Gould* v. *Gould*, 245 U. S. 151, 153; *Eidman* v. *Martinez*, 184 U. S. 578, 583; *United States* v. *Field*, 255 U. S. 257, 262; *United States* v. *Wigglesworth*, 2 Story, 369, 373; *Blair* v. *Herold*, 150 Fed. 199, 201. In *Gould* v. *Gould*, the court declared that—

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

Consideration of the reasoning and rulings in the courts below will persuasively show that there is reasonable ground for doubting whether the act of September 8, 1916, was ever intended to tax past transfers, and that its words are not "so clear, strong and imperative that no other meaning can be annexed to them" except that which taxes such transfers. The learned judges in the lower courts have, indeed, differed in almost every material particular.

In the case of *Shwab* v. *Doyle*, which is now pending in this court (October Term, 1921, No. 200), the learned district judge ruled that the tax was not in fact retroactive at all, because it taxed only the transfer of the probatable assets of which the decedent died possessed, and that the tax was to be measured, not only by the value of those assets, but also by the value of all the assets which the decedent had in his lifetime transferred in contemplation of death or to take effect in possession or enjoyment at or after death. It will be observed that, under this theory, if one died possessed of no property there would be no tax whatever, notwithstanding the fact that on the day before death the decedent had, in direct contemplation of his impending decease and for the express purpose of evading the tax, transferred away all his property. The language of the statute clearly does not sanction any such outcome.

In *Levy* v. *Wardell*, now pending in this court (October Term, 1921, No. 303), the decedent left no estate whatever at death, but had made gratuitous transfers of property prior to the enactment of the law in suit. Notwithstanding the ruling of the district court in the *Shwab* case, and its clear implication that no tax was imposed in such a case as the *Levy* case, the learned district judge in the *Levy* case, nevertheless, held the contrary and sustained a tax imposed upon the donees.

Shwab v. *Doyle* was subsequently carried to the Circuit Court of Appeals for the Sixth Circuit, where the court rejected the reasoning of the district court, but upheld the tax upon the ground that it was a valid retroactive transfer tax (269 Fed. 321). In the case at bar the court below merely followed this ruling (273 Fed.

733). But in the recent case of *Curley* v. *Tait*, 276 Fed. 840, the learned district judge felt constrained to decline to follow the reasoning and construction of the Circuit Court of Appeals in the *Shwab* case, and wrote in part as follows (at p. 842):

> "They [i. e., the plaintiffs] say that no tax at all was collectable because the transfers here in controversy were all made before the statute was enacted. To this the government has two answers. It says that the statute itself declares that it has reference to a transfer made 'at any time.' These words, however, are susceptible of a reasonable construction, which would limit them to transactions taking place thereafter.
>
> "Congress may well have thought it important to make clear that the length of time before the death at which a transfer took place was not to be a controlling circumstance. The words used were apt to express that intention, and may well have been employed with the limitation, usually implied, that they were not to affect transactions which had already taken place. The rule, of course, is that statutes are not to be given a retroactive construction when by doing so 'antecedent rights are affected or human conduct given a consequence it did not intend.' *Union Pacific Railroad Co.* v. *Snow*, 231 U. S. 204, 213.
>
> "For reasons which will be hereinafter set forth, this statute, if retroactively applied, will, in some instances, cause serious hardship and injustice. The courts have gone to great lengths in construing away language which, in its more natural import, seems to indicate that the Legislature intended the act should affect transactions which had been entered into before its passage. *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190. If this were a case of first impression, I personally would have no hesitation whatever in holding that the act of 1916 does not affect transfers made before it was passed.

"But the government says, in the second place, that in *Shwab* v. *Doyle*, 269 Fed. 321, the Circuit Court of Appeals for the Sixth Circuit held the act to be retroactive. Diversity of decision is especially unfortunate in the construction of tax statutes, in which uniformity of interpretation and application are so important. Moreover, a court of equal rank would hesitate long before differing with a tribunal so eminent for wisdom and learning as that which has spoken on the subject. Nothing short of the clearest conviction will justify a District Judge in doing so; but there are rare occasions in which he must, because, as the law does not make a decision of a Circuit Court of Appeals binding outside of its own circuit, the responsibility of determination is one from which he cannot escape.

"In *Shwab* v. *Doyle, supra*, the case of *Wright* v. *Blakeslee*, 101 U. S. 174, was cited as authority for holding a similar statute retroactive. The act there construed imposed a tax upon the succession —that is, upon the right to receive—and was levied upon what passed to the heir, devisee, legatee, distributee, or successor, and not upon the estate. *Knowlton* v. *Moore*, 178 U. S. 41, 42, *et seq.* The distinction is neither pedantic nor technical, but, as applied to the matter now in hand, is in the highest degree practical. In *Shwab* v. *Doyle, supra*, it was held that the addition made by the act of 1918 (40 Stat. 1097) of the words 'whether such transfer is made or occurred before or after the passage of this act,' was a legislative construction, rather than an amendment, of the statute now under consideration. The Supreme Court has since taken the opposite view as to other broadening language then first introduced. *U. S.* v. *Field*, 255 U. S. 257.

"The case before the Circuit Court of Appeals was one of a transfer made in contemplation of death. It answered the objection to the practical hardships which a retroactive construction might entail by saying:

"'It is true that, if the tax before us is retroactive, it might, at least theoretically, affect conveyances made many years before a grantor's death; but this consideration is hardly practical. Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say 25 years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the 2-year prima facie provision.'

"Apparently the court's attention was not drawn to some of the consequences which, in a case like the one at bar, would follow from a retroactive construction. The present act, unlike its federal predecessor, is an estate tax, and not a tax upon the right to receive. If the government's contention be sustained, the tax will come, not as in *Wright* v. *Blakeslee, supra,* or in *Cahen* v. *Brewster,* 203 U. S. 543, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of the property going to Grafflin's widow. Would Grafflin have made any of these transfers, had he understood by so doing he would impose a charge upon his wife of upwards of $23,-000? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable.

"It is easy to conceive of a case in which a man of large estate might, before the passage of the act of 1916, have made considerable transfers to relatives, friends, or to charitable or educational institutions in somewhat the same fashion as Grafflin did, reserving for some residuary legatee a comfortable and even handsome balance of his estate. If the government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more than the residue of the estate, large as the testator had every reason to

suppose it would be, and the Supreme Court, in langauge already quoted, has held that the courts will not assume that Congress intended any such consequences. *Union Pacific R. R. Co.* v. *Snow, supra.*

"It follows that the demurrer to the declaration must be overruled generally."

This conflict of opinion among enlightened judges, together with the amendment of the law in suit by Congress in 1919, are, it is submitted, alone sufficient to establish that it is doubtful whether Congress intended the act of September 8, 1916, to operate retroactively so as to tax transfers made many years before its enactment.

Turning now to the language of the act which the Government asserts supports its demand for a retroactive tax, it will be found that it does not require any such construction. The act contains no express language of necessary retroactive connotation. The argument seems rather to be that it contains some expressions which, if given an unlimited effect, may embrace the past; in other words, that language which, as matter of legal construction could have a prospective application alone at least as well as it could have a retroactive application, must, nevertheless, be interpreted retroactively. Such a contention presses the literal reading of the law to the extreme. It overlooks the settled rule that "courts will not . . . enforce a literal interpretation when by so doing antecedent rights are affected or human conduct given a consequence it did not intend," and that "such a purpose the courts refuse to assign to the legislature unless compelled by language explicit and imperative" (*Union Pacific R. R. Co.* v. *Snow*, 231 U. S. 204, 213), as well as the "principle which has always been held sacred in the

United States that laws by which human action is to be regulated look forward, and not backward, and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable" (*Reynolds* v. *McArthur*, 2 Pet. 417, 434).

The Government regards as immaterial or negligible the fact that the retroactive interpretation would work injustice. Yet this court has repeatedly declared, upon the fullest consideration, that "where a particular construction of a statute will occasion great inconvenience, or produce inequality and injustice, that view is to be avoided, if another and more reasonable interpretation is present in the statute" (*Knowlton* v. *Moore*, 178 U. S. 41, 77), and that "general terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence" (*United States* v. *Kirby*, 7 Wall. 482, 486). It is, therefore, unavailing to argue that the act of September 8, 1916, imposes a tax "upon the transfer of the net estate of *every* decedent dying after the passage of this Act" (sec. 201), and that, therefore, the tax is intended to be imposed upon *every* past transfer of *every* such decedent. When one recalls to mind the enormous gifts made prior to September 8, 1916, by men like Mr. Rockefeller and Mr. Carnegie, the menace which lurks in a retroactive interpretation of the statute is clearly revealed. If those gifts be found to have been made either in contemplation of death or to take effect at or after death, their total value as of the time of death would be the measure of the tax, which is progressive in character. A most substantial tax would then inevitably be laid upon the estate of the transferor, which might

certainly be thereby seriously impaired and, conceivably, even wiped out altogether.

Moreover, the property which has thus been given away in life may now, at the time of death, be many times more valuable than it was when given. The tax, however, is measured upon and by the value at death. The injustice worked by that circumstance is aggravated by the fact that at death the property in question may no longer belong to the original transferee. He may have disposed of it many years before it appreciated in value, and thus he, too, may not have profited by the accretion in value, but, nevertheless, the transferor's estate would be taxed upon and in accordance with the value at death, although it might well be that neither he nor the object of his beneficence had ever known or had the advantage of the increased value. And if it happened that the transferor's estate was insufficient to pay the tax, the burden thereof would then, by the terms of the act (sec. 209), directly fall upon the transferee.

The Government, however, contends that the intent of Congress to make the transfer tax in question retroactive is expressed in the language of subdivision b of section 202 of the act of September 8, 1916, to the effect that the gross estate shall include "any interest of which the decedent *has at any time made* a transfer, or with respect to which he *has created* a trust," etc. The past tense thus used is pointed to and relied upon as indicating a legislative intent to have the act operate retrospectively. But it is submitted that the past tense was employed for no such purpose. A perusal of the section will disclose that it speaks as of the time of the death of the decedent, which, according to section 201, must be "after the pass-

age of this Act." Thus, section 202 defines "the value of the gross estate of the decedent . . . at the time of his death" by including therein the interests specified "of which the decedent *has* at any time *made* a transfer, or with respect to which he *has created* a trust". Referring in this way to the future death of the decedent, the section necessarily had to use the past tense in order to deal with acts done during the decedent's lifetime. The tense employed has its appropriate function in this relation; but it by no means follows from the mere use of the past tense that the words "has . . . made a transfer, or . . . has created a trust" traverse the indefinite past. Their use is accorded apt and full effect if they are made to go backward from the date of death only to the time of the enactment of the law. That would satisfy the established canons of statutory interpretation, give the language its ordinary meaning and avoid unjust and oppressive results.

Indeed, if we lose sight of the fact that section 202 speaks as of a time "after the passage of this Act," the entire clause is given an absurd meaning. If it be construed to speak as of the date of the passage of the act, the words "has made" and "has created" would refer only to transfers made and trusts created before the passage of the law. That would result in taxing only transfers made and trusts created before the statute was passed, and would leave untaxed all transfers made and trusts created after its enactment. Obviously that was not the intent of Congress, and this outcome confirms the view that the past tense is employed in section 202 only because that section was intended to speak as of the time of the death of the decedent.

In the case of the *Succession of Westfeldt*, 122 La. 836, 842, the state constitution provided that no inheritance tax should be levied where the property donated or inherited "*shall have borne* its just proportion of taxes prior to the time of such donation or inheritance". It will be observed that this use of the future perfect tense is the substantial equivalent of the past tense as used in subdivision b of section 202 in the case at bar, and there, too, the taxing authorities attempted to assert a right to tax retroactively. The court, however, repudiated the contention, saying:

> "We are of opinion that the provisions of the constitution . . . do not extend or reach back to conditions anterior to the constitution itself; that the constitution looks to the present and to the future, not to the past."

The phrase "at any time" in subdivision b of section 202 is singled out by the Government as requiring a retroactive construction and effect. It is argued that transfers made at any time in the past are included in the gross estate for the purposes of the tax by virtue of the provision that the gross estate shall embrace interests "of which the decedent has *at any time* made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect at or after his death."

It will be at once noted that the phrase "at any time" is not employed in the clause which deals with the creation of trusts. In the subsequent act of February 24, 1919 (40 Stat. 1057), however, Congress did insert those words in the act so as to make the gross estate cover, not only the interests "of which the decedent has at any

time made a transfer", but also those of which "he has *at any time* created a trust", etc. The subsequent amendment should, therefore, "be regarded as a legislative declaration that the law did not, as originally passed, embrace the provisions which the later act supplies" (*Matter of Miller*, 110 N. Y. 216, 222; *United States* v. *Field*, 255 U. S. 257, 265; *Smietanka* v. *First Trust & Savings Bank*, Oct. Term, No. 540, decided February 27, 1922). The case at bar is, consequently, not within the purview of the act of September 8, 1916, in any event, for it is a case in which the donor, Henriette Lachman, created a *trust* more than fifteen years before the passage of the law.

Aside, however, from this consideration, it is obvious that the words "at any time" do not require a retroactive application of the taxing act. They can be accorded apt force and effect without recourse to any such exceptional, doubtful and unjust taxation. In subdivision a of section 202 transfers of the decedent's interests which take place "at the time of his death" are dealt with. It was, therefore, entirely proper for Congress to make clear in the immediately following subdivision of the same section that the transfers in contemplation of death or to take effect in enjoyment or possession at or after death, which are there dealt with, were not confined to those which occurred at the time of death, but included those made "at any time" prior thereto.

But the purpose with which Congress used the words "at any time" appears when one considers the relation between them and the sentence which immediately follows that in which the words in question occur. The second sentence of the subdivision declares that—

> "Any transfer . . . made by a decedent within two years prior to his death . . . shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

With nothing in the subdivision to counteract its effect, the sentence quoted would have afforded ground for the contention that transfers in contemplation of death could only be those which were "made by a decedent within two years prior to his death." To eliminate the possibility of any such reading of this sentence, Congress wrote into the preceding sentence the direction to include in the decedent's gross estate the interests "of which the decedent has *at any time* made a transfer . . . in contemplation of . . . death." As District Judge Rose has tersely expressed it in *Curley* v. *Tait*, 276 Fed. 840, 843:

> "Congress may well have thought it important to make clear that the length of time before the death at which a transfer took place was not to be a controlling circumstance. The words used were apt to express that intention, and may well have been employed with the limitation, usually implied, that they were not to affect transactions which had already taken place."

Moreover, section 209 of the act supports the prospective interpretation of the act, for it provides in part that—

> "If a decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death . . . and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property to the extent of the decedent's interest therein at the time of

> such transfer shall be subject to a like lien equal to the amount of such tax," etc.

This provision relates to both transfers made and trusts created before death; but, as its language plainly shows, it is of prospective operation only. It uses no past tense. It does not employ the words "at any time". It cannot, however, be reasonably doubted that it was intended to cover the same ground as section 202. If a retroactive intent had animated Congress, section 209 would have been phrased quite differently. It would then have provided that if a decedent "has at any time heretofore made or shall hereafter make" a transfer or trust, the transferee shall be liable for the tax in the manner and under the circumstances mentioned in section 209. Any clear intention to impose such an extraordinary and novel tax upon transferees, reaching back throughout the unlimited past, and that, too, whether they had or had not continued to own and enjoy the property, would certainly not have been left to implication, but have been expressed in as plain language as was used, for example, in the act of 1864, quoted above at p. 17.

A consistent construction of sections 202 and 209 is, therefore, to be found only in viewing their provisions as prospective; and, of course, the court will endeavor to harmonize all the provisions of the act, if possible. *A. Bryant Co.* v. *N. Y. Steam Fitting Co.*, 235 U. S. 327, 337; *Market Co.* v. *Hoffman*, 101 U. S. 112, 116.

It has been further suggested that if the act be construed as inapplicable to transfers prior to its passage, the clause which erects a presumption that a transfer made within two years prior to death was made in con-

templation of death, is not given due force and effect. But the contrary seems reasonably clear. This rule of evidence becomes effective from the day of the enactment of the law. It at once shifts the burden of proof to the taxpayer in respect of *every* transfer made on and after September 8, 1916, and keeps the burden there for two years. After that period has elapsed, only such transfers as are made within two years before the death of a decedent are governed by the statutory presumption. This construction thus accords the clause proper and prospective effect. The act of September 8, 1916, was designed to set up a permanent system of taxation, and it would not have been possible to insert in it a provision casting the burden of explanation upon the estate or the transferee under the specified circumstances, except by the use of substantially some such language as was in fact employed. The clause, it will be borne in mind, is not a taxing clause; it does not attempt to levy any tax; it provides a mere rule of evidence. It would, therefore, be quite extraordinary to attempt to spell out of it the clear and imperative command to tax which the law requires of retroactive tax legislation.

What has thus far been written sufficiently discloses that no clear language of necessary retroactive force is to be found in the statute which would sustain the contention of the Government, but solely broad general terms almost always to be found in general laws. This court has, however, repeatedly held that such generality is not sufficient warrant for retroactive, unusual or exceptional taxation or legal effect. *Evans* v. *Gore*, 253 U. S. 245; *United States* v. *Goelet*, 232 U. S. 293, 297; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 402; *Holy*

Trinity Church v. *United States,* 143 U. S. 457. Thus, in *United States* v. *Goelet, supra,* it was argued that an act which taxed "any citizen" using a foreign-built yacht was applicable to a citizen permanently domiciled abroad. Ths court held to the contrary, Mr. Chief Justice White saying:

> "Indeed we think it must be conceded that the levy of such a tax is so beyond the normal and usual exercise of the taxing power, as to cause it to be, when exerted, of rare occurrence and in the fullest sense exceptional. This being true, we must approach the statute for the purpose of ascertaining whether its provisions sanction such rare and exceptional taxation. Considering the text, we search in vain for the express declaration of such authority. True, it is argued by the United States, that as the tax is levied on any citizen using a foreign-built yacht and as any includes all, therefore the statute expressly embraces a citizen permanently domiciled and residing abroad. But this argument in effect begs the question for decision which is whether the use of the general words, any citizen, without more should be considered as expressing more than the general rule of taxation, or in other words can be treated without the expression of more as embracing the exceptional exertion of the power to tax one permanently residing abroad."

It is submitted that this reasoning is peculiarly applicable in the case at bar. The taxation of past transfers is rare, exceptional and essentially unjust. The words "every decedent" and "at any time", above discussed, should not, therefore, be so applied as to effect such retroactive taxation; and particularly so in view of the fact, as we have seen, that no compelling necessity for such an interpretation exists and that these terms can each be given due force and meaning if read normally and prospectively

and to apply only to transfers made after the enactment of the law.

II.

The sources and judicial history of the provisions embodied in the Estate Tax Act of September 8, 1916, indicate that they were not intended to be retroactive.

It is well-known and generally admitted that the language employed in the Federal Estate Tax Act of September 8, 1916, was derived from the transfer tax laws of the several states. The Ways and Means Committee of the House of Representatives reported that in drafting the bill it had had all the state statutes before it (Report No. 922, 64th Congress, 1st session, p. 5), and it undoubtedly moulded the language of the law in suit in the light of these state enactments and of the interpretation which had been accorded to them by the courts of the several states. The statute in suit reproduces in large part the terminology of the state laws. The state decisions are, consequently, more than ordinarily important in the case at bar, because "it is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body". *Kepner* v. *United States*, 195 U. S. 100, 124; see also *Norfolk Southern R. R. Co.* v. *Chapman*, 244 U. S. 276, 280-1; *Willis* v. *Eastern Trust Co.*, 169 U. S. 295, 307; *Blair* v. *Herold*, 150 Fed. 199, 203, affirmed, 158 Fed. 804; *Interstate Commerce Com.* v. *Del., L. & W. RR. Co.*, 220 U. S. 235, 253-4; *McDonald* v. *Hovey*, 110 U. S. 619, 628; *Ocean Co.* v. *Industrial Accident Com.*, 173 Cal. 313, 317.

State statutes had long taxed in terms transfers made in contemplation of death and transfers made to take effect in possession or enjoyment at or after death, as well as transfers at death. In the state courts, however, it had been uniformly recognized as fundamental, and it became soon the established rule of law, that a transfer tax could not be levied upon a past transfer, whether or not made in contemplation of death or to take effect in possession or enjoyment at death. It was reasoned that the tax was inherently an excise imposed upon the exercise of the right or privilege of transfer; that it was imposed in consideration of the protection accorded by the law to the transfer, or in virtue of the right of the state to lay a tax upon the privilege of transfer or succession, which it could regulate, grant, or withhold at will. Where, however, the right or privilege had previously been exercised, that is, where the transfer had already been made and was past, it was perceived by the state courts and distinctly ruled that there was no longer any right or privilege left to be exercised or to tax, that there was now no transfer at all for the law to regulate, or protect, or operate upon, or for the state to permit or to forbid, and that hence it followed that no right or privilege of this nature was in existence upon the exercise of which any transfer tax could in fact be incident, or in consideration of which the tax could be properly exacted. The transferor now had nothing left to be taxed in respect of such a past transfer; he no longer had the property or subject-matter of the transfer, and he was not exercising or about to exercise any right or privilege, or doing any act whatever in respect of a transfer concerning which he required the protection of the state. To

tax him or his estate would, therefore, merely be to impose upon him an arbitrary exaction under the guise of a tax. In such cases, it was apparent that "although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property" (*Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 24; see also Cooley on Taxation, 7th ed., p. 695). The transferee now had the property, and perhaps not even that, if he had previously consumed or disposed of it; and he, too, was not now receiving any right, favor, or protection from the law or the state in respect of any transfer to him. If he still held the property, to tax him because he had received it in the past, was in effect to tax him merely because he owned the property, that is, to tax his ownership as such, and thus to subject him to a direct property tax. But as his ownership of property was now no different in any essential respect from the ownership of any other person, it was likewise plain that the selection of such a class of transferees for special taxation was in realty "not the exertion of taxation" but an unwarranted discrimination against them as property owners, and, therefore, an invalid confiscation of property rights. And if it happened that the transferee no longer had the property transferred, as where he had previously consumed or disposed of it, the tax was then as arbitrary as in the case of the transferor, and equally indefensible and unconstitutional.

Mr. Justice Holmes tersely stated the principles governing attempts to tax past transfers as such in the

following extract from his dissenting opinion in *Chanler v. Kelsey*, 205 U. S. 466, 480:

> "If . . . a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the state court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State; and, as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. *Matter of Pell*, 171 N. Y. 48, 55; *Matter of Seaman*, 147 N. Y. 69."

The foregoing considerations convinced the state courts that retroactive transfer tax laws were void, and in order to escape that consequence in particular cases, or constitutional doubt upon that score, the state courts, wherever possible, refused to decree a retroactive interpretation to transfer tax acts. Among the principal of these adjudications are the following: *Matter of Pell*, 171 N. Y. 48, reversing 60 App. Div. 286; *Matter of Vanderbilt*, 172 N. Y. 68, 73; *Matter of Delano*, 176 N. Y. 486, 494-5; *Matter of Craig*, 97 App. Div. 289, affirmed on the opinion below, 181 N. Y. 551; *Matter of*

Lansing, 182 N. Y. 238, 242, 247; *Matter of McKelway*, 221 N. Y. 15, 19; *Hunt* v. *Wicht*, 174 Cal. 205; *Provident Association* v. *People*, 198 Ill. 495; *People* v. *Carpenter*, 264 Ill. 400; *Herriott* v. *Potter*, 115 Iowa 648; *Gilbertson* v. *Ballard*, 125 Iowa 420; *Lacey* v. *State Treasurer*, 152 Iowa 477; *Commonwealth* v. *Wellford*, 114 Va. 372; *Succession of Oyon*, 6 Rob. (La.) 504; *Arnaud* v. *Executors*, 3 La. 336; *Succession of Stauffer*, 119 La. 66, 70; *in re Collateral Inheritance Tax*, 88 Me. 587; *State* v. *Safe Deposit & Trust Co.*, 132 Md. 251; *Miller* v. *McLaughlin*, 141 Mich. 425; *State* v. *Probate Court*, 102 Minn. 268; *Executors of Eury* v. *State*, 72 Oh. St. 448; *Carter* v. *Whitcomb*, 74 N. H. 482; *Commonwealth* v. *McCauley's Executor*, 166 Ky. 450. See also *Cahen* v. *Brewster*, 203 U. S. 543, 552-3, affirming *Succession of Levy*, 115 La. 377; and Holmes, J., in *Chanler* v. *Kelsey*, 205 U. S. 466, 479; *Folsom* v. *United States*, 21 Fed. 37; Gleason & Otis on Inheritance Taxation (2nd ed.), pp. 35, 57, 173; Randolph on United States Inheritance and Transfer Taxes (1917), p. 36; Gray on Limitations of Taxing Power, p. 754; *Attorney-General* v. *Parker*, 31 Nova Scotia Rep. 202.

The leading case is the *Matter of Pell*, 171 N. Y. 48. There remainders had been transferred and vested in interest in 1863, and at that time they were not subject to any transfer tax. Thirty-six years afterwards, an act was passed, effective March 14, 1899, which sought, in express terms, to render such previously vested remainders taxable upon the falling in of the life estate. In the *Pell* case that event occurred in December, 1899. The New York Court of Appeals invalidated this attempt to set up a retroactive transfer tax, saying (pp. 55-6):

"This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It, therefore, follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation.

"The learned Appellate Division reached the conclusion that this amendment of 1899 was unconstitutional, and we agree with them in that regard. They have, however, sustained this legislation on the ground that it is a direct tax upon property and a legitimate exercise of the taxing power. In so holding that learned court uses this language: 'It may seem incongruous that a transfer tax act, which in principle was intended to impose a tax upon the right of succession, should be construed in such a way as to uphold the tax as one upon property. Our conclusion, therefore, upon the whole case is, that if the tax sought to be imposed could only be supported upon the principle that it is a tax upon the right of succession, then there would be objections, among them constitutional ones, to its validity; but that with reference to the estate here involved, if the act can be construed, as with some misgivings we think it can, as a tax upon property, it is free from constitutional objections, and the tax may be upheld.'

"We are of the opinion that it is a violent

presumption as to the intention of the legislature to construe an act, which is avowedly designed to tax the succession of property, on the death of its owner, as a direct tax.

"It would seem to be too clear for argument that the legislative intention in this regard was to deal with the act relating to taxable transfers and with nothing else. . . .

"To say that the act was not an amendment of the law relating to taxable transfers of property is to contradict what plainly appears upon its face."

A similar effort to tax a past transfer was defeated in the *Matter of Craig*, 97 App. Div. 289, affirmed on the opinion below, 181 N. Y. 551. The Appellate Division there said (pp. 291, 296):

"It seems to me to be immaterial to consider whether the remainders created by the trust instrument to which the appellants have now become entitled are to be regarded as vested or contingent, or whether the instrument is to be regarded as conveying such remainders as gifts *inter vivos* or as gifts *causa mortis*. The point presented by the appeal is that the right as a property right to take the gifts when the time for possession and beneficial enjoyment should ultimately arrive had fully accrued at the date of the marriage and the birth of the children free from any existing tax upon the transfer regarded either as a transfer then made or contemplated in the future, and that subsequent legislation imposing such a tax must be deemed unconstitutional as in effect the taking of private property for public use without compensation or as impairing the obligation of a contract. (Const. art 1, Sec. 6; U. S. Const. art. 1, Sec. 10, subd. 1.) In other words, the appellants contend that at least as early as May 9, 1885, they had acquired their rights by irrevocable deed; that such rights whether vested or contingent then constituted present property interests in future estates which were vested in the sense

that they were secured to them by deed subject only to contingencies as to time and survivorship; that incident to the ownership of such property was the absolute right to its acquisition in possession and enjoyment at the stipulated time; and that such ultimate right of possession and enjoyment, being absolute and not merely privileged, could not afterwards be taxed by the State because of well-settled principles of constitutional law. I am inclined to the view that the contention is sound. In the discussion the appellants must be regarded on May 9, 1885, as being in the same position as they would have been in if the remainders had been acquired by purchase instead of gift, and it cannot be that the State can levy an assessment upon the right of a citizen to enjoy the fruits of a prior purchase which when made was wholly free from such an imposition. . . .

"I do not lose sight of the fact that the transfer tax is levied, not upon the property affected, but upon the right of succession. The underlying principle which supports the tax is that such right is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

The doctrine thus announced in the *Matter of Pell* and *Matter of Craig, supra,* is not only well settled in the State of New York, but has been followed and established throughout the country. It was expressly approved and adopted in California in *Hunt* v. *Wicht,* 174 Cal. 205. In that case a husband had made a transfer to his wife in 1905, when there was no law taxing such

a transfer by husband to wife. In 1911, however, a statute was passed imposing a tax upon any transfer by deed "made without valuable and adequate consideration in contemplation of the death of the grantor, . . . or intended to take effect in possession or enjoyment at or after such death", and taxing it when the party taking "becomes beneficially entitled in possession or expectancy to any property . . . by any such transfer whether made before or after the passage of this act." The husband died in 1913, and thereupon the wife went into possession under the transfer of 1905. A tax was claimed in respect of the transfer to her upon the ground that it was made in contemplation of death, as well as upon the ground that it was intended to take effect in possession and enjoyment at death. The court held that the transfer was made and complete in 1905; that, under it, the wife had acquired a vested remainder, and that, consequently, no transfer tax could validly be imposed upon this past transfer, despite the fact that the wife did not come into the actual possession of the property until the death of her husband. The court reasoned as follows (p. 208):

> "We have then the case of a grant of land so executed and delivered on April 12, 1905, as to be fully operative and effective on that date to vest a present title in the grantee, subject only to a life interest in the grantor; 'an executed conveyance' (*Estate of Cornelius*, 151 Cal. 550) of this property in fee simple absolute, subject only to this life interest. Could the legislature subsequently lawfully impose a succession tax upon this fully executed transfer of title, such tax accruing at the termination of the grantor's reserved life estate, simply because in the meantime the grantee was debarred by the intervening life estate from

actual possession of the property conveyed and the other incidents of a life estate? It appears to us that to state the question is to answer it. The succession to the property by the grantee, which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate. The whole estate conveyed vested irrevocably in interest at once, notwithstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death, or at any time subsequent to the delivery in escrow. The right of the grantee to have actual physical possession of the property itself and enjoyment of the other incidents of an estate for life upon the death of the life tenant was absolutely vested by the delivery of the deed in escrow, and non-defeasible, and the legislature could not thereafter lawfully destroy, impair, or burden this property right under the guise of a succession tax on account of the transfer."

In Illinois and other jurisdictions the same result has been attained by refusing to give a retroactive construction to statutes which were not so unambiguously retroactive as those involved in the foregoing cases. Thus, in *People* v. *Carpenter*, 264 Ill. 400, 408, the court declared:

"If appellee's (State of Illinois') construction be correct, the necessary effect will be to give the act a retrospective operation, and it will have to be held to be applicable to all voluntary dispositions of property that have been heretofore made in this state. If it be conceded that the power, under the Constitution, exists in the Legislature to pass an act so broad and sweeping in its terms as this would be under the construction contended

> for, we would not be justified in attributing such an intention to the Legislature upon any mere doubtful or ambiguous language. Ordinarily statutes will not be given a retrospective effect unless there is no other reasonable interpretation to be placed upon their language. Let it be supposed, to illustrate, that 20 or 30 years before this statute was passed a property owner conveyed all of his estate to his children as a voluntary gift, reserving to himself a life estate, only, in the property. The title vests in remainder, upon the delivery of the conveyance, in the donees. If the donor died after the statute of 1909 went into effect, under appellee's construction the conveyances to the children would be subject to the transfer tax. We are constrained to believe that the Legislature never intended any such result."

In *Herriott* v. *Potter*, 115 Iowa 648, 652, the court reasoned similarly in the following language:

> "The inheritance tax is not levied on property, but depends wholly on the collateral heir taking property. It is on the right to succeed to ownership, and after this has passed to the heirs the estate has fallen out of the class at which the particular tax is aimed, and become subject to that rule of equal taxation, guaranteed to all property of like character. If a tax on succession, the amount of which cannot be ascertained, may relate back one year, so as to compel payment by those who have acquired property by inheritance within that time, then it may stretch back over a period of 20 or any number of years, and the citizen never know with any degree of certainty what burdens are to be imposed."

In *Commonwealth* v. *Wellford*, 114 Va. 372, 379, the court, after reviewing the authorities, summarized their effect as follows:

> "These cases illustrate the doctrine (which is plain on principle without authority) that a collateral inheritance tax statute, which becomes a

> law after an estate has vested in interest, cannot apply to such an estate, though it does not come into the actual possession and enjoyment of the owner until after the passage of the act."

The doctrine of the foregoing authorities has been substantially recognized in this court. In *Cahen* v. *Brewster*, 203 U. S. 543, 552-3, it was argued by counsel that it was an unconstitutional discrimination for a state to impose a transfer tax where the succession was still open while failing thus to tax where the succession had been closed. Of course, it was clear that where the succession had been closed, the transfer was made and complete, and, therefore, as has been shown, a thing of the past and no longer taxable. That fact distinguished it in a most important respect from the case in which the succession, and hence the transfer to be effected thereby, were not yet complete. The latter case remained a proper subject for taxation; and, accordingly, this court so ruled. Mr. Justice McKenna speaking for the court, among other things, said:

> "Plaintiffs in error also contended that the statute denied them the equal protection of the laws. This contention is based on the following provision of the statute: 'This tax to be collected on all succession not finally closed and administered upon, and on all successions hereafter opened.'
>
> "Successions which have been closed, it is said, are exempt from the tax, and a discrimination is made betwen heirs whose rights have become fixed and vested on the same day. Counsel say: 'The closing of the succession cannot affect the question as to when the rights of the heirs vested; and cannot be a cause for differentiation among the heirs; and such a classification is purely arbitrary. Besides, such a classification rests on the theory that the tax is one on property, when in fact it is

> one on the right of inheritance.' But, as we understand, the Supreme Court made the validity of the tax depend upon the very fact which counsel attack as an improper basis of classification. The court decided that the property bequeathed was property the State could tax, 'until it had passed out of the succession of the testator.' It was certainly not improper classification to make the tax depend upon a fact without which it would have been invalid. In other words, those who are subject to be taxed cannot complain that they are denied the equal protection of the laws because those who cannot legally be taxed are not taxed."

As a corollary of the settled doctrines of state transfer taxation which prohibits the taxation of past transfers, there has grown up the rule that the liability for a transfer tax is both measured and determined by the laws in force at the time when the transfer occurs. If at that time an exemption is accorded, no subsequent law can validly increase or decrease it, so far as a past transfer is concerned; if at that time one rate of taxation obtains, no later law can raise or lower such rate, in respect of past transfers. In California this rule is strictly observed. Thus, if the transfer tax rate be lowered, it is held that the new rate cannot validly apply to the prior transfer, because to make it applicable would be to interfere with the then vested right of the state to the larger tax, and thus, in effect, to give to private parties a portion of the state's property, which is forbidden. In the very recent case of *Potter* v. *Chambers*, 63 Cal. Dec. 141, 143, Chief Justice Shaw said:

> "The transfer of October, 1908, immediately passed to Jesse S. L. Potter the title to the property as of that date. It is settled law that the tax is levied on the transfer of title, or on the exercise of the right to transfer the title, includ-

ing, of course, the right of the transferee to receive it, and not on the property itself, and that while the provisions imposing the tax on prior transfers in contemplation of death or with intent that they take effect in enjoyment at death are but safeguards against attempts to evade the tax, the recipient of a present transfer of that character is bound only for the inheritance tax due upon it under the law in force at the time the title passes, and the legislature has no power to raise the rate or increase the tax on such transfer by a subsequent act. (*Hunt* v. *Wicht*, 174 Cal. 205; *Est. of Felton*, 176 Cal. 663; *Est. of Gurnsey*, 177 Cal. 214; *Nickel* v. *State*, 179 Cal. 128; *Est. of Brix*, 181 Cal. 671-2; *Est. of Murphy*, 182 Cal. 746; *Est. of Miller*, 195 Pac. 417; *Chambers* v. *Gibb*, 198 Pac. 1032; *Chambers* v. *Lamb*, 199 Pac. 34). . . .

"It is also settled that the right to such tax vests in the state at the date of the taxable transfer, and that the legislature cannot by subsequent acts reduce the rate of taxation thereon, since to do so would be to make a gift of the property of the state to the extent of the reduction, contrary to section 31, article IV of the constitution. (*Est. of Stanford*, 126 Cal. 118; *Trippet* v. *State*, 149 Cal. 521; *Est. of Woodard*, 153 Cal. 39; *Est. of Martin*, 153 Cal. 227; *Est. of Kennedy*, 157 Cal. 527; *Est. of Rossi*, 169 Cal. 149.)"

See also *Matter of Sloane*, 154 N. Y. 109, 113; *Matter of Davis*, 149 N. Y. 539; *Matter of Abraham*, 151 N. Y. App. Div. 441, 442; *State* v. *Safe Deposit & Trust Co.*, 132 Md. 251, 253; *Pullen* v. *Commissioners*, 66 N. Car. 361; *Commonwealth* v. *Eckert*, 53 Pa. St. 102.

The authorities discussed in this point clearly show that in the several states it is not competent to tax past transfers as such, and that the state courts have in numerous cases refused to accord retroactive force and effect to substantially the same formulae of taxation

as are now embodied in the Federal Estate Tax Act of September 8, 1916. In the jurisprudence of the states, those terms in a transfer tax act do not import retroactive operation. Such was and is their settled legal meaning in the United States, and it is submitted that Congress must be presumed to have had in mind that meaning and to have intended precisely that effect when, presumably cognizant of the judicial determinations mentioned above, it wrote the language which is now before this court for interpretation and application.

III.

The Estate Tax Act of September 8, 1916, if applied to past transfers would be unconstitutional in that it would constitute in substance and practical effect an unapportioned direct tax, if a tax at all.

In the case at bar, the incidence of the tax in suit is directly upon the estate of the deceased life-tenant, the testatrix, Mrs. Lachman, although she left no interest in the property she had transferred in 1901, and although no interest in that property passed to her legatees under her will or by way of succession. Her estate is selected for taxation solely because of transfers which were made and completely closed many years before the enactment of the tax law. The statute, if construed to apply, would plainly not impose a tax upon a transfer by will or upon succession to the property of a decedent. The transfer thus taxed had been made in 1901 and no property interest whatever is being transferred or succeeded to as part of a decedent's estate. In essence and final analysis, it is a tax upon the estate left by a decedent, dependent solely

upon the fact of some past act of transfer, and measured in part by the present value of property so transferred in the past. It is submitted that any such selection of a class—that is, of those who have made certain transfers in the past—in order to levy a tax upon their estates, measured by the value of property which they have long since ceased to own, is, if the exertion of the power of taxation at all, as direct a tax upon the property or estate of the particular class so selected as would be a tax upon such property or estate by name. If, however, it be termed a tax upon the estate of a decedent measured by the value of past transfers, then it is obviously not a transfer tax in the nature of an excise payable upon the doing of certain acts, but an unapportioned direct tax upon the property of the decedent, and as such is measured by the wholly arbitrary standard of the present value of property long since parted with.

The state courts, in adjudicating the invalidity of a tax upon past transfers, have uniformly recognized the essential difference between a tax on past and a tax on future transfers. A future transfer involves a privilege to be exercised or an act to be authorized or protected by the law, as well as a situation within the contemplation of the transferor when he does the taxable act in the light of the then existing circumstances of tax law and liability. A past transfer involves none of these elements. There is now no privilege to be exercised and no act to be authorized or protected by the law. There is left no situation which the parties may accept or reject at will and thus accept or decline tax liability. The transfer has been wholly and irrevocably made, and to tax it is to do so quite regardless of any present power of elec-

tion in the parties. Nothing which they can now do can alter the matter—the tax must be paid. This "element of absolute and unavoidable demand" (*Thomas* v. *United States*, 192 U. S. 363, 371), has frequently been noted as one of the characteristics of a direct tax as contradistinguished from an excise or indirect tax. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 151-2; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 558. Thus, in the *Flint* case Mr. Justice Day, referring to the Corporation Income Tax of 1909, declared that:

> "The requirement to pay such taxes involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable."

As to transfers subsequent to the passage of the act of September 8, 1916, it can readily be perceived that no one need make such a transfer unless he sees fit; and that, if he does, the consequent tax liability is only of his own election. He avails of the protection afforded by the law to such a transfer. Such an imposition is truly an indirect tax or excise upon the act or transaction of transfer, though payable at the death of the transferor, for it is "levied upon the happening of an event" (*Knowlton* v. *Moore*, 178 U. S. 41, 47), or "because of the particular occasion which gives rise to its levy" (*id.*, p. 81). But where the transfer occurred many years before the taxing act, the transaction stands upon quite a different footing. The transfer then cannot be undone; the taxpayer can make no choice; there is no longer any act to be done; the event has happened and no longer exists; the occasion for the tax has come and gone while there was no tax liability. Under such cir-

cumstances, the tax is not an indirect tax, but, considered in the most favorable light, in substance and effect a direct tax in the operation and incidence of which the element of absolute and unavoidable demand and liability are necessarily present.

In the case at bar, the present imposition is a direct tax upon Mrs. Lachman's estate because there is no longer any transfer or succession to be taxed. It is similar to a tax levied upon persons because they had imported or manufactured or sold merchandise in the past. That, it is submitted, would be a direct tax upon the present property of such importers, manufacturers and sellers. It would not at all resemble the indirect taxes laid upon present or future imports, manufactures or sales. These are obviously escapable; they lack the element of absolute and unavoidable demand; they involve acts or transactions protected by the law. But a tax upon past importation, or manufacture, or sale, as such, like a tax upon past transfers, is an absolute and unavoidable demand, and hence, a direct tax.

So, indeed, have the rulings in the state courts viewed the matter in principle. Thus, in the *Matter of Pell*, 60 N. Y. App. Div. 286, the Appellate Division which thought it possible to uphold a tax upon a past transfer as a present property tax, recognized the plain distinction between the taxation of past and future transfers, and said (pp. 288, 290):

> "If we could conclude under the Transfer Tax Act, that nothing could be taxed but the right of succession, then it would follow in this case, as the right to succession passed in 1863, that the property here involved was not taxable. . . .

> Here this tax must be supported, if at all, upon the theory that it is a tax upon property. . . .
>
> "What the legislature here intends is to tax property. . . . It could not very well tax the right of succession, for that had taken place years before the Tax Act was passed; and we think, therefore, that the tax can only be supported upon the principle that it is a tax on property."

The Court of Appeals, however, reversed this ruling (171 N. Y. 48), as we have seen, upon the ground that a tax upon a past transfer was not a transfer tax at all, and refused to hold that a property or direct tax was, as matter of fact or construction, intended by the legislature, although the court declared that such a tax would also be void, saying (at pp. 55, 56):

> "They [*i. e.*, the Appellate Division] have . . . sustained this legislation on the ground that it is a direct tax upon property. . . .
>
> "We are of the opinion that it is a violent presumption as to the intention of the legislature to construe an act, which is avowedly designed to tax the succession of property, on the death of its owner, as a direct tax. . . .
>
> "We might well be justified in declining to further consider the question of whether this is an effort to impose a direct tax upon property."

But "assuming, however, that the legislature intended to exercise its power of direct taxation" (p. 57), the court found that that would be likewise invalid; and Chief Judge Parker placed his concurrence in the decision upon the ground that the tax act did "not provide for a direct tax upon property and [that] in so far as it [aimed] to tax transfers of estates already vested when the act was passed, . . . it [was] void" (p. 60).

In the *Matter of Craig*, 97 App. Div. 289, 296, affirmed on the opinion below, 181 N. Y. 551, the court

again directed attention to "the fact that the transfer tax is levied, not upon the property affected, but upon the right of succession," and that—

> "The underlying principle which supports the tax is that such right is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question; and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

Viewing the matter "according to truth and substance," and "without regard to form" (*Eisner* v. *Macomber*, 252 U. S. 189, 206), a tax upon a past transfer is, in its effect and incidence, a direct tax on property or ownership as such. A tax of so many dollars an acre would be the plainest example of a direct tax. A like tax upon the privilege of having heretofore transferred or received the land, would be precisely the same in every substantial particular. The name would be different but nothing else, and "the name by which a tax is described . . . is, of course, immaterial." *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 292, 294; see also *Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 235; *Eisner* v. *Macomber*, 252 U. S. 189, 206. No privilege would be in fact involved or exercised; in final analysis, the past or present ownership of property would alone be taxed. But "the mere right to own and hold property cannot be made the subject of excises, since the levying of a tax by reason of ownership of property is to tax the property"

(*Craig* v. *E. H. Taylor & Sons*, 232 S. W. 395, 396, Ky.; *Dawson* v. *Kentucky Distilleries Co.*, *supra*).

The Constitution of the United States indisputably requires the apportionment of direct taxes (art. I, secs. 2 and 9) and "this limitation still has an appropriate and important function, and is not to be overridden by Congress or disregarded by the courts" (*Eisner* v. *Macomber*, 252 U. S. 189, 206). It must, therefore, be accorded a substantial meaning and effect. It must be self-evident, however, that that limitation could be almost entirely circumvented and practically nullified, if past transfers might be taxed under the name of excises. Every sale, gift, or other disposition of property—however long past—would then be brought within the scope of so-called indirect taxation, and virtually all property and ownership placed within its reach. It is reasonably certain that the framers of the Constitution would have viewed any such taxation as direct to all intents and purposes. Those who insisted that the apportionment limitation be twice written into the Constitution would have at once realized that they had secured no actual protection thereby if a tax could be levied upon the value of all property that had ever been transferred in the past. The immunity which they then insistently sought would prevent, for example, a tax upon land *eo nomine*, but would impose no obstacle to a precisely like tax upon any transfer of the land by sale, gift, succession, or otherwise. Here would be a so-called excise, privilege, or indirect tax, which no owner of property could escape and to which he would be subject merely because he now or in the past had owned property. "A tax upon

property holders in respect of their estates, . . . the payment of which cannot be avoided, [is a] direct tax," this court held in the *Pollock case*, 157 U. S. 429, 558, and in the recent case of *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 294, it was declared that "to levy a tax by reason of ownership of property is to tax the property." What but a property or a direct tax is a tax upon the past transfer of property measured by its value? It certainly is not a tax upon a transfer, for there is none to tax. The sovereign is not granting a privilege nor affording protection to any one in respect thereof. At most, the protection now accorded is precisely the same as that given to any other property or owner. All that remains is the property and its present owner or former owner, and all that can now be taxed is the property or the ownership as such.

It was undoubtedly the foregoing considerations which led District Judge Mayer to rule in *Kissam* v. *McElligott* (not reported; reversed, 275 Fed. 545; now pending in this court, October Term, 1921, No. 602), as follows:

> "The tax imposed by section 202 [of the Estate Tax Act of September 8, 1916] is clearly a succession tax. . . . If construed retroactively, from one standpoint it would impose a tax on property owned by Cornelia Kissam prior to the passage of the act and might be open to serious constitutional objections on the ground that it imposed a direct tax without apportionment among the states."

The true nature of an alleged transfer tax imposed upon transfers long past and completed is further revealed in the act of September 8, 1916, by the fact that the tax thus laid is, in the first instance, payable by the estate of the transferor, and payable, not in accordance

with the value at the time of the transfer, but in accordance with the value at the time of his death. Where a transfer was previously completely made, it is self-evident that the transferor and his estate now have nothing for the tax to attach to. The property has long been out of his hands. He and his estate need and can have no legal protection in this respect. The privilege of transfer has likewise long since disappeared. The original owner does not now ask any such privilege, and requires and avails of no legal protection in that regard. It follows, therefore, that, so far as the transferor and his estate are concerned, there is no transfer as such to tax; in other words, the alleged tax is but an arbitrary exaction from the transferor's estate. *Union Transit Co.* v. *Kentucky*, 199 U. S. 194, 202, 204.

The arbitrary character of the tax on past transfers is intensified by the fact that the basis of the liability and the rate depend upon the value of the transferred property at the time of the transferor's death. That means that, perhaps many years after the transfer, when the property may have greatly increased in value, the transferor's estate will be called upon to pay a tax, not only in respect of property which has not been his for many years, but at a value which it has attained in the hands of others long after the transfer. The property may now even have passed out of the ownership of the original transferee; it may have increased in value because the subsequent owners exploited it and found minerals or oil upon it,* its increase in value may have benefited others than either the transferor or the transferee;

* See *supra*, pp. 10-11, note, where some illustrations are given from official records to show large increases in value in some California lands.

but, nevertheless, the act of Congress makes the value of the property at the time of the death of the transferor the measure of the tax. Unreasonableness and arbitrariness, it is submitted, could not be conceived in any greater extreme. Such a standard is unwarranted, unreasonable and oppressive. It falls within the condemnation visited by this court upon a similar inequitable mode of levying a tax in *Knowlton* v. *Moore*, 178 U. S. 41, 76, 77, where Mr. Justice White said:

> "Granting, however, that there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of $10,500 bequeaths to a hospital ten thousand dollars. The rate of tax would be five per cent, and the amount of tax five hundred dollars. Another person dies at the same time, leaves an estate of one million dollars, and bequeaths ten thousand dollars to the same institution. The rate

of tax would be $12\frac{1}{2}$ per cent, and the amount of the tax $1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. . . .

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

See also *Black* v. *State*, 113 Wis. 205.

The tax under the act of September 8, 1916, does not rest upon any more defensible ground when it falls upon the transferee, as happens, under the terms of the act, when the transferor dies leaving no estate. As has been pointed out above, in that case nothing but the property previously transferred and its present ownership exist. The past transfer itself is, of course, only mere history. The tax is, in that case, a direct tax on ownership as such, or it is nothing but an arbitrary spoliation under the forms of law.

Nor is its measure any more reasonable in this instance. The value of the property at the time of the death of the transferor may, indeed, be an immaterial circumstance, so far as the transferee is concerned. That does not, in any sense, measure what he got by the gift or transfer. He may not own the property at the time of the transferor's death; he may have long previously sold it; he may not have had a cent's worth of benefit

out of its increased value; that may have come to others only long after he ceased to have any connection with the property. To tax him at the greater value, notwithstanding the foregoing considerations, is to transcend anything which law-making bodies in free countries may properly do. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 599; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24. It is of no consequence whether we designate such a violation of fundamental rights, a taking of private property without just compensation (Cooley on Taxation, 7th ed., p. 695), or an infringement of the guaranty of due process of law, or a violation of "those fundamental conceptions of free government which underlie all constitutional systems" (*Knowlton* v. *Moore*, 178 U. S. 41, 77). In any event, it is an unreasonable and arbitrary exertion of legislative power and not the legitimate exertion of the power of taxation.

It is submitted that the foregoing objections constitute serious and well-founded charges of constitutional infirmity in the Estate Tax Act of September 8, 1916, and that, certainly, none may reasonably regard them as obviously untenable. By the settled rule of law, therefore, the statute in suit should be interpreted so as to avoid this doubt, if fairly present. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407-8; *United States* v. *Bennett*, 232 U. S. 299, 303; *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score" (*United States* v. *Jin Fuey Moy*, *supra*). This rule does not require the court to pass upon the grave constitutional issues involved in

the case at bar (*United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408; *McNally* v. *Field*, 119 Fed. 445, 448), if the language of the enactment permits of a constitutional interpretation. In this case that is manifestly true; the statute need only be confined to a prospective operation, which is not only the normal situation, but is wholly consistent with every word of the act.

IV.

As to the claim of the Government below that the act of September 8, 1916, imposes a prospective excise tax upon the coming into possession of future estates.

The difficulty of upholding the act of Congress of September 8, 1916, as one intended to tax past transfers and as valid in that respect, has led the Government into advancing somewhat inconsistent contentions in the courts below, which will be examined in this and in the two succeeding points. Thus, it was argued below in the case at bar that the act intended to impose a tax upon the "coming into possession" of future interests created by past transfers, although the act does not specify or import any such incidence, and although the estate of the transferor is primarily made to bear the tax and not the transferee who comes into possession. It must, however, be manifest that this theory does not take into account the attempt of Congress in the very same sentence to tax out-and-out gifts, that is, gifts (without any remainders or future interests) which were made in contemplation of death before the taxing act was passed. In such cases delivery and possession may have actually

taken place many years before the enactment of the law, but such gifts are nevertheless taxable, according to the contentions of the Government. It seems clear that both of these classes of cases were intended to be placed by Congress upon the same footing; they are in fact provided for in the same sentence of the same subdivision of section 202, and the same theory of taxation ought reasonably to be applicable to both, for the same general intent presumably was in mind.

It was further contended that the act imposed a tax upon past transfers under which remainders were created, on the theory that the transfers were not completed until the remaindermen took possession upon the death of the grantor, the life-tenant. Under the law of the State of California, which of course regulates the property interests of the parties in the case at bar, there is no such incompleteness in transfers creating future estates, for it is the settled rule that the transfer now in question vested absolutely in the transferees in 1901. Here, likewise, is a theory which fails to take account of the taxation of outright gifts made in contemplation of death, which belong in the same category, but cannot be said to be incomplete in any sense.

Another theory urged by the Government below was that the act did not tax past transfers at all, but only the transfer of or succession to the assets possessed by the decedent at death, and that it used the past gifts or transfers, namely, those made in contemplation of death or to take effect in enjoyment or possession at or after death, merely as the measure of the tax. This theory is inconsistent with the others, for it does not depend at

all upon coming into possession; and it should also be noted that, under it, no tax would be collectible if the decedent died without assets; and, consequently, any one could defeat the tax merely by transferring all his property shortly before death. Notwithstanding this contention, namely, that the past transfers are used only by way of measuring the tax upon the transfer of the decedent's estate, the Government is, nevertheless, resisting the recovery of the tax in *Levy* v. *Wardell,* now pending in this court, where the decedent died without leaving any property, and in that case the tax is sought to be upheld upon grounds which disregard the so-called measurement and coming into possession theories altogether.

In the act of September 8, 1916, there is no indication or implication of any intent on the part of Congress to tax the so-called "coming into possession" *by third parties* of property previously transferred to them. The act states that the tax is imposed "upon the *transfer* of the net estate" (sec. 201), and this "transfer" is so defined in the act as to embrace (1) transfers which take place at death, (2) transfers made in contemplation of death, (3) transfers made to take effect in enjoyment or possession at or after death, and (4) certain other transfers (sec. 202). Repeatedly the statute refers to "transfer" as the act, transaction, right, or privilege taxed, and the Department of Internal Revenue has itself frequently declared that the tax is solely a transfer tax (*e. g.*, art. IV, Treasury Dept. Regulations No. 37, revised to May, 1917, quoted *supra,* p. 16). Indeed, no other view would seem to be reasonably possible, since the terms of the act in suit are derived from state trans-

fer tax laws, which, as has been seen above, tax only the transfer as such and do not tax past transfers, notwithstanding the fact that the remaindermen first come into possession thereunder after the passage of the taxing act.

The language of the act of Congress, the origin of its clauses, the intent underlying its provisions and the departmental interpretation, all tend to establish beyond doubt the fact that the tax imposed is and was intended to be a transfer tax. This being so, the transfer whereby the remainders are created is the act or transaction taxed, and not any subsequent coming into possession as the result of an already completed transfer whereby remainders were created and vested prior to the passage of the act.

Obviously, if the coming into possession were the act or privilege intended to be taxed, the tax would reasonably and naturally have been imposed upon the transferee who thus came into possession. But the tax in suit is not so imposed except secondarily; it is primarily an estate tax, as its language declares; it is not payable by the remainderman who comes into possession, but by the estate of the transferor, unless there happens to be an insufficiency of assets in the estate. There is no reasonable or logical theory under which a tax can be levied against a transferor or his estate upon the coming into possession by *a third party* of property long before transferred to the latter, for in such coming into possession no right or privilege is exercised by the transferor or his estate and no possible benefit or advantage whatever would result to him or his estate.

Again, the act taxes transfers intended to take effect in possession *after* the death of the decedent, as well as those intended thus to take effect at his death; and in both cases the tax is, nevertheless, collected at the grantor's death and is primarily payable by his estate. If, however, the tax were in fact one upon the coming into possession, it would be only just and reasonable that it should be paid when possession was actually taken, which might not occur for years after the death of the transferor. That, is however, neither the theory nor the practice under the act in question. Indeed, it is expressly provided in section 208 of the act that, except in certain cases, "the tax shall be paid out of the estate before its distribution."

The statute taxes transfers of only such decedents as shall die after the date of passage of the act. But if the act intended to tax the coming into possession, it would not exempt, as it does, transfers made by decedents dying prior to the enactment of the law but which do not actually come into possession until after the passage of the act.

A reading of subdivision b of section 202 will show that it deals, in the same bracket and certainly upon the same plane, with transfers made in contemplation of death and transfers made to take effect in possession or enjoyment at or after death. In such circumstances, it is reasonable to expect that the same intent and theory of taxation should control both. But, under the Government's contention, that is not possible. Gifts to take effect in possession at or after death are, it is contended by the Government, taxable because of the coming into

possession at death; but gifts in contemplation of death are, nevertheless, sought to be taxed, despite the fact that they may have come into possession long before the death of the transferor. A construction of the law should be sought which would be equally applicable to and explain both of these classes of gifts. The prospective interpretation contended for by the plaintiffs-in-error accomplishes that result. It does not have recourse to any such theory as the doctrine of coming into possession. It taxes transfers in contemplation of death as well as transfers to take effect in possession or enjoyment at or after death, *as transfers,* and irrespective of the accrual of possession. If, therefore, it appears that the transfer was made since the act was passed, the transfer is taxable regardless of the time when possession was or will be taken. And so, indeed, the act is construed and enforced by the Government in relation to transfers made after the passage of the law.

It will be observed that under the Government's contention the act operates in different ways forward and backward—when it is prospectively applied, the coming into possession rule finds no place; but when retrospectively applied, this theory is resorted to. Thus there result conflicting theories of interpretation and intent of the same words of the same act.

The Government's contention not only finds no support in the terms of the act, but it is submitted that it argues for a tax which would be unconstitutional. If the tax were imposed upon the right of the transferee to enter into possession of his own property, it would be clearly in substance and effect a tax upon the property

itself, and as such, a direct tax, which must be apportioned. The right to take possession of one's own is plainly the most elemental attribute of the ownership of the property. Without it property is nothing. If one may be taxed upon coming into possession or taking possession, as upon a privilege or as an excise, then virtually nothing might be left of property or property ownership for direct taxation to operate upon as a practical matter. If a remainderman can be subjected to a so-called excise tax upon or because of coming into possession, so may every landlord or reversioner at the end of a term. And it is but carrying the doctrine to its logical conclusion to point out that it would support an excise tax upon a landholder every time he entered upon the property, for it is clear that the landowner who enters his property, the landlord who enters at the end of a tenant's term, and the remainderman who enters at the death of the life tenant, go into or take possession of their own in essentially the same manner. They but exercise an essential right or incident of property ownership in so doing. It must, therefore, be clear that once it is ruled that an excise tax may be properly levied upon the coming into possession by a remainderman, the first step has been taken towards taxing by excises the most essential attribute of property and property ownership as such, and little force and effect would be left in the limitations of the Constitution forbidding direct taxation without apportionment. Certainly if a tax on the right to collect income from property be a direct tax, then a tax upon the right to take or come into possession of property, real or personal, is *a fortiori* a direct tax.

In *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, a tax was imposed of fifty cents on every gallon of whiskey withdrawn from bond, that is, taken into the possession of the owner. It was argued that that was an indirect tax upon the right to take possession of the liquor, that is, upon the coming into possession thereof, but this court held it to be a direct or property tax, Mr. Justice Brandeis saying (p. 294):

> "In fact the tax is one imposed upon each lot of whiskey at the time it is removed from bond within the State. The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower court, 'the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i. e.*, consumption, sale or keeping for future consumption or sale . . . The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property. . . . It cannot be made an occupation or license tax by calling it so."

Transfers which, although having an origin in the past, are, nevertheless, properly taxable, are illustrated by the decisions which have upheld transfer tax laws in respect of estates still *in custodia legis* and in course of administration, although the decedents had died before the tax law was passed;* and also by the decisions which have upheld taxes laid upon the exercise of powers of

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**Cahen* v. *Brewster*, 203 U. S. 543; *Carpenter* v. *Commonwealth*, 17 How. 456; *Gelsthorpe* v. *Furnell*, 20 Mont. 299; *Montgomery* v. *Gilbertson*, 134 Iowa 291; *Ferry* v. *Campbell*, 110 Iowa 290; *Herriott* v. *Potter*, 115 Iowa 648; *Succession of Stauffer*, 119 La. 66; *De Witt* v. *Commonwealth*, 184 Ky. 437.

appointment, notwithstanding the fact that these powers in the particular cases had been created before the transfer tax laws were passed.* In both of these classes of cases, the transfer tax was sustained because the persons actually taxed were the beneficiaries of privileges exercised and accruing under existing machinery of the law, and because the actual exercise of these privileges occurred after the tax statute was passed. In both of these classes of cases, transfer taxes were sustained on the theory that a right or privilege created or protected by the law was being actually exercised after the tax statute was passed. The probate cases decide that the utilization of probate proceedings is a taxable privilege. But it has been held in such cases that where the estate has been closed *(Cahen v. Brewster)*, or the assets have been distributed *(Succession of Stauffer)*, or probate is unnecessary *(Herriott v. Potter)*, then no tax can be laid by a statute passed after the owner's death. The power of appointment cases decide that the exercise of such a power is in itself a taxable privilege which may be taxed although the power was created before the tax law was passed. In the first class of cases, the probate law and its benefits and privileges are still in course of utilization, and in the second, the exercise of the power of appointment involves the privilege of exercising a power of appointment or the privilege of making a will wherein the power is exercised.

No such theory can be advanced in support of a tax on the coming into possession of a remainder created and vested long before the transfer tax act was passed. The

Orr v. Gilman, 183 U. S. 278; *Chanler v. Kelsey*, 205 U. S. 466.

machinery of the law is not utilized by the remainderman, because a remainder "being created by act of the owner of the property, instead of arising by operation of law, its subsequent taking effect in possession, does not depend upon the continuance of the present laws" (2 Tiedeman on State and Federal Control of Persons and Property, p. 638). It does not depend upon probate administration, or the execution of any power or any instrument, or the continuance of the present law, but has its basis in a fundamental and elementary property right unalterably fixed by the law in force when title was acquired and dependent upon nothing but the lapse of time. Therefore, in coming into possession, a remainderman exercises no privilege dependent upon the machinery of the law. His act is an essential prerogative of property ownership and is the mere assertion of a fundamental property right.

Since entry into possession of property, therefore, is not taxable as a privilege, the act of September 8, 1916, would be invalid if it were construed as laying a tax upon the coming into possession, for in that event it would levy a direct tax upon property.

It is true that the states have sometimes taxed coming into possession (*Moffit* v. *Kelly*, 218 U. S. 400). But they are free to tax property or property ownership directly without apportionment, and no federal question arises even when they do so under an erroneous designation (*id.*, pp. 403-5). The decisions above considered (point II, *supra*) make it apparent, however, that a tax upon the coming into possession is not a transfer tax at all, but, on the contrary, a direct or property tax. Perhaps,

nowhere does that more clearly appear than in such a case as the *Matter of Pell*, 171 N. Y. 48, reversing 60 App. Div. 286. There, as we have already seen, remainders had been created prior to the taxing act, but they did not come into possession until after the passage of the tax law. It was clearly recognized by the courts that such a tax was in fact and effect a direct or property tax (60 App. Div. 288, 290, 291, 292; 171 N. Y. 54, 56, 60).

Nothing to the contrary was decided in *Scholey* v. *Rew*, 23 Wall. 331. That case arose under the act of 1864 and concerned a devise of land made by a wife who died in 1869, while the act was in force. The case, therefore, involved only a transfer at death occurring after the passage of an applicable taxing act. The case did not have to do at all with future estates, or postponed coming into possession, or retroactive transfer taxation. The case merely decided that the act of 1864, in taxing a "*future* disposition of real estate by will," imposed a valid transfer tax, and that that tax was an indirect tax. That is not now disputed. But the questions presented in this brief were neither presented nor raised nor were they decided in the *Scholey* case. Indeed, they could not arise, for the transfer involved was made after the taxing act was passed and the gift was not a gift of a future estate, but of one simultaneously and immediately vesting in title and possession.

Nor is the case of *Keeney* v. *New York*, 222 U. S. 525, in point. The case involved a transfer in trust whereby the transferor reserved a life income and created remainders to take effect in possession or enjoyment at her death. The transfer was held taxable since the law by

which the tax was laid was passed in 1896 and the transfer occurred in 1903. The case, therefore, did not deal with the question presented in the case at bar. It was but the typical case of a transfer to take effect in enjoyment at death, made while a transfer tax law was in force.

It was, however, argued in that case by the remaindermen that the taxing act did not tax the transfer whereby the remainders were created, but only the coming into possession thereunder, and that that event was not taxable under a law like that of 1896. But it was held by the court that the intent was to tax the transfer by which the remainders were created and not the coming into possession.

The court also added the following (222 U. S. at p. 533):

> "There is no natural right to *create* artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property *under such deeds* than legatees and devisees under a will. The privilege of *acquiring* property *by such an instrument* is as much dependent upon the law as that of *acquiring* property by inheritance, and *transfers by deed* to take effect at death have frequently been classed with death duties, legacy and inheritance taxes." (Italics ours.)

The foregoing quotation clearly does not tend to support the Government's coming into possession argument. It was written in answer to the argument of the Keeney heirs that a transfer creating remainders to take effect at death is in its nature different from a transfer by will, in that the former involves the exercise of a right and the latter a privilege. The court held that the two types of transfers were properly classed together in a trans-

fer tax law and that both involved the exercise of a privilege. It is clear from the phrases italicized above that the court was dealing with *transfers* creating remainders, and *not* with the coming into possession of remainders already created. Moreover, the facts of the case and the opinion as a whole preclude the assumption that the court had in mind a tax upon the coming into possession of already vested remainders. In fact, this point was not dealt with, for the court cut off all suggestion of a tax on coming into possession when it held, as we have seen, that the tax was upon the transfer, which had been made after the tax law was passed. This holding was necessary in order to answer the objections founded upon the fact that the property was not within the jurisdiction at the time of the coming into possession. Nothing more clearly emphasizes the point of the decision than the concluding part of the opinion where the court held that the tax was controlled by the conditions which existed at the time of the transfer made in 1903 and not by conditions which existed in 1907, when the life tenancy terminated and the remaindermen took the property into their possession.

The case of *Wright* v. *Blakeslee*, 101 U. S. 174, decided no question of constitutional law because none was raised. It involved merely a question of statutory construction; and in it the court held that the act of 1864 taxed a bare contingent remainder (not vested remainders such as are involved in the case at bar) when it became a vested estate in possession or expectancy after the passage of the tax law, although created before, because the taxing act expressly applied to every "past", as well

as to every future, "disposition of real estate, by will, . . . by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate" (see p. 177). This clear and unambiguous language compelled the retroactive construction given. Congress, however, did not see fit again to adopt this language in the statute in suit, nor to enact a succession or distributive share tax as in 1864, but enacted a transfer tax payable by the transferor and not by the transferee then coming into possession. On the contrary, Congress chose the language of state transfer tax statutes which had been uniformly interpreted not to operate retroactively, that is, not to tax past transfers.

V.

As to the claim of the Government below that the vested remainders involved in the case at bar can be taxed upon the theory that they were not finally and completely transferred until the death of the testatrix.

It must be manifest that the act of September 8, 1916, does not purport to affect the law of property, wills, descent, or distribution which prevails in the several states, even if it be assumed that any such power resides in Congress. The statute plainly takes the state law as it finds it. *Lederer* v. *Pearce*, 266 Fed. 497, 499; *Wardell* v. *Blum*, 276 Fed. 226, 227. The point was tersely stated as follows by Circuit Judge Woolley in the *Pearce* case, *supra:*

> "From the form of the Federal Estate Tax Act, it is evident the Congress intended that the act should operate not in opposition to but in

> harmony with the many different state acts with which, because of its very terms, it would come into contact. *Lederer v. Northern Trust Co.* (C. C. A.), 262 Fed. 52. Therefore in creating an estate tax, the Congress very wisely leveled the tax at that property of decedents which is subject to distribution as part of their estates according to the laws of different states (Section 202), after deducting therefrom such expenses, claims and charges against estates as are allowed by the laws of the states under which they are administered (Section 203). Thus it appears that the Federal Estate Tax may reach property in one state when it would fail to reach like property in another, according as the laws of distribution and administration vary in different states."

The law of the state being thus the test, it should at once be pointed out that in California the transfer of remainder interests under such circumstances as obtained in the case at bar is regarded as working complete transfer of title at the time the remainders are created, notwithstanding the postponement of possession until death or thereafter. In *Hunt* v. *Wicht*, 174 Cal. 205, a deed was delivered in escrow upon the agreement that the grantor, the husband, was to receive the income from the property for life and the grantee, the wife, to have the remainder after his death. The court held that this created a vested remainder, and among other things said (p. 208):

> "We have then the case of a grant of land so executed and delivered on April 12, 1905, as to be fully operative and effective on that date to vest a present title in the grantee, subject only to a life interest in the grantor; 'an executed conveyance' (*Estate of Cornelius*, 151 Cal. 550) of this property in fee simple absolute, subject only to this life interest. Could the legislature subsequently lawfully impose a succession tax upon this fully

executed transfer of title, such tax accruing at the termination of the grantor's reserved life estate, simply because in the meantime the grantor was debarred by the intervening life estate from actual possession of the property conveyed and the other incidents of a life estate? It appears to us that to state the question is to answer it. The succession to the property by the grantee, which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate. The whole estate conveyed vested irrevocably in interest at once, notwithstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death, or at any time subsequent to the delivery in escrow. The right of the grantee to have actual physical possession of the property itself and enjoyment of the other incidents of an estate for life upon the death of the life tenant was absolutely vested by the delivery of the deed in escrow, and nondefeasible, and the legislature could not thereafter lawfully destroy, impair, or burden this property right under the guise of a succession tax on account of the transfer."

It follows from this authoritative ruling that the contention that the transfer of the remainders in the case at bar was not complete until the death of the testatrix, cannot be sustained under the California law. It is clear also, as has been seen above (point II), that throughout the United States generally it is held that when remainders are created, the full enjoyment of which depends only on the flight of time, the transfer is complete and vests the moment the remainders are created (see, *e. g., Matter of Pell,* 171 N. Y. 48, 54).

It should be added that this argument of the Government, like the coming into possession argument discussed in the preceding point, if available for any purpose, is applicable only to transfers creating future estates. It does not apply to absolute transfers *inter vivos* made in contemplation of death, for in such cases the property vests absolutely in the transferee, both in title and in possession, at the moment the gift is made, and there is no subsequent event upon which to rest any suggestion of an incomplete transfer. Here again the Government's contention attempts to deal differently with two classes of transfers which the statute places upon a parity and couples together in the same sentence.

There are, it is true, certain classes of transfers which have been held to be incomplete when made. These, however, have no bearing upon the question now under discussion. For example, it has been held that, if a transfer of title is initiated before a transfer tax law is passed and the transfer is ambulatory and remains in an inchoate and ineffective state until after a transfer tax law is passed, then the transfer is taxable, not through any retroactive operation of the act, but upon the theory that the transfer of title does not take place until the moment the transfer ceases to be incomplete, and the taxing law is then in force and becomes applicable. In *Matter of Seaman*, 147 N. Y. 69, and *People* v. *Carpenter*, 264 Ill. 400, the opinions deal with transfers which remained inchoate, ambulatory and ineffective until the death of the grantor and the transfer of title did not become complete until that time.

The recent cases of *Nickel* v. *Cole*, 256 U. S. 222, and *Carter* v. *Bugbee*, 92 N. J. L. 390, are of the same kind.

In both cases the tax was sustained only because the interest was not fully and completely transferred, according to the applicable local law, until after the taxing act took effect.

The foregoing authorities illustrate the nature of the cases in which transfers have been regarded as incomplete until the death of the transferor. But, obviously, these decisions do not apply to such a case as the one at bar where the remainders were granted and title thereto fully and completely passed and vested in 1901, fifteen years before the death or the passage of the taxing act. It is clear from the *Pell* case, *supra*, and the numerous decisions following it (point II), that a transfer is complete when the title passes, and that remainders by grant are created and title passes completely upon delivery of the instrument of grant and regardless of any subsequent event. The authorities referred to by the Government in the court below do not in any wise militate against these contentions or show any incomplete transfer in the case at bar.

The cases in which the exercise of a power of appointment has been made taxable by a state are likewise not in point here. The states have control over the law of property; they have the right to treat the exercise of a power of appointment as the completion of a transfer or as a new transfer; they may do so generally or for the purpose of taxation only. But the National Government may not re-write the property laws of the several states, and it is manifest that Congress did not attempt to do so in the act of September 8, 1916. The point was well expressed in *Ebersole* v. *McGrath*, 271 Fed. 995, 998, as follows:

"The defendant relies most strongly upon *Chanler* v. *Kelsey*, (205 U. S. 466). The question considered there, however, was not whether the exercise of such a power of appointment was a transfer of the donee's estate within the meaning of a law such as that now under consideration, but whether it was an act upon which a state could lay a succession tax without violation of the Fourteenth Amendment and without impairing the obligation of a contract. By the law of the State of New York there construed it was declared that the exercise of the power of appointment should be 'deemed a transfer' taxable as though the property belonged to the donee. The Court of Appeals of New York had held that the tax was laid upon the exercise of the power of appointment by will 'as an effective transfer for the purposes of the act.' At page 478 of 205 U. S., the Supreme Court say:

'As in *Orr* v. *Gilman*, 183 U. S., *supra*, we must accept this decision of the New York Court of Appeals holding that it is the exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed. That power was exercised under the will of Laura Delano, a right which was conferred upon her under the laws of the State of New York and for the exercise of which the statute was competent to impose the tax in the exercise of the sovereign power of the legislature over the right to make a disposition of property by will.'

"Upon reflection it seems clear that the conclusion there reached was not that the execution of a power was generally to be deemed a transfer or conveyance for all purposes or that the estate appointed was to be deemed that of the donee, generally speaking, but that, for some purposes, the execution of the power does constitute a transfer so as to warrant the legislature of a state to declare it such for the purposes of taxation. I do not understand that decision to abrogate the general rule of the common law, but to hold that a state may properly do so by statute. The statute now

> under consideration, therefore, must be construed in the light of the common law."

However the question of the exercise of a power of appointment may be regarded, there is therein no analogy to the case at bar where no power of appointment is involved, but where it is plain that the transfer of the remainders was complete and vested in the transferees when made in 1901 and that the subsequent taking of possession on the falling in of the life estate could not alter or affect the completeness of the original transfer creating vested remainders.

VI.

As TO THE CLAIM OF THE GOVERMENT BELOW THAT THE ACT OF SEPTEMBER 8, 1916, SHOULD BE CONSTRUED TO IMPOSE A TAX UPON THE TRANSFER OF THE ASSETS OF WHICH THE DECEDENT DIED POSSESSED MEASURED BY THE VALUE, NOT ONLY OF THOSE ASSETS, BUT ALSO OF ALL THOSE WHICH HE AT ANY TIME TRANSFERRED IN CONTEMPLATION OF DEATH OR TO TAKE EFFECT IN ENJOYMENT OR POSSESSION AT OR AFTER DEATH.

The third theory urged by the Government below was that the statute does not tax past transfers, as such, but only the transfer of the net estate of the decedent at death, but that the measure of the tax is the value of the estate left by the decedent plus the value of all the transfers made by him during life in contemplation of death or to take effect in enjoyment or possession at or after death. This contention cannot, however, be reconciled either with the language or purpose of the statute, and, if adopted, would give rise to arbitrary results and grave constitutional difficulties.

It is patent on the face of the argument that it leads to an absurd consequence which Congress never could have intended. Under it, an individual dying without any estate would not be taxable at all; and that would have to follow even if he had only shortly before his death transferred away all his property in contemplation of his imminent demise and for the very purpose of evading the tax. But "a bad result suggests a wrong construction" (*People ex rel. Beaman* v. *Feitner,* 168 N. Y. 360, 366); and so, too, must the Government itself have believed, for it refused to abide by the logical outcome of its own contention when, in *Levy* v. *Wardell* (now pending in this court), it appeared that the decedent had left no estate at death. Notwithstanding that fact, the Government insisted on taxing the transferees in that case because they had received a gift in contemplation of death. The district judge in *Shwab* v. *Doyle* (also now pending in this court), sustained the Government in its so-called "measurement" argument, but the Circuit Court of Appeals, which affirmed the decision (269 Fed. 321), was careful to avoid adopting this contention (p. 327), and no other court has accepted it since.

To apply it at all, it is first necessary to hold that the words "the net estate" in section 201 of the act are used in two quite different senses when twice employed in the same section and sentence only eighteen words apart. The section reads as follows:

> "A tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of *the net estate,* to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of *the net estate* of every decedent dying after the passage of this Act."

Thus, under the Government's contention, it is a prerequisite of the argument to assert that the value of "the net estate" whose transfer is taxed in this sentence is different from the value of "the net estate" which is made the measure of the tax therein. In other words, that "the net estate" whose transfer is taxed is limited to the estate of which the decedent died possessed, while "the net estate" whose value measures the tax includes the estate being transferred as well all property which the decedent gave away in his lifetime in contemplation of death or to take effect in enjoyment and possession at or after death.

It is, of course, possible for the same words not to mean the same thing in different parts of an enactment (*Towne* v. *Eisner*, 245 U. S. 418, 425), but that is not the normal case. *Prima facie* the same words have the same meaning throughout an act, and certainly that should be deemed to be the case where the repetition of them occurs in the same sentence and in close proximity. *United States* v. *Central Pac. R. R. Co.*, 118 U. S. 235, 240; *Mangam* v. *City of Brooklyn*, 98 N Y. 585, 592; *Case of Gagnon*, 228 Mass. 334, 338; *Ryan* v. *State*, 174 Ind. 468, 474; *State Public Utilities Commission* v. *Early*, 285 Ill. 469, 474; *In re Jackson*, 40 Fed. 372, 374; 2 Sutherland on Statutory Construction, p. 758. Different meanings should, of course, not be assigned to the same phrase of a law merely in order to accomplish injustice and oppression.

But the argument is in plain conflict with other provisions of the act itself. Thus, in section 209 it is provided that:

> "If the decedent makes a transfer of, or creates a trust with respect to, any property in contem-

> plation of or intended to take effect in possession or enjoyment at or after his death . . . *and if the tax in respect thereto* is not paid when due, the transferee or trustee shall be personally liable for such tax," etc.

It will be observed that this passage expressly refers to a tax in respect of transfers in contemplation of death or to take effect in possession or enjoyment at or after death. But under the Government's contention there is no such tax; the tax is solely in respect of the transfer of the estate remaining at death, and only the measure of this tax has to do with anything else. The Government's argument, therefore, would practically nullify the above quoted words in section 209, "the tax in respect thereto," which plainly mean the tax in respect to transfers in contemplation of or to take effect in enjoyment or possession at or after death.

Again, if the tax were in fact levied only upon the transfer of the assets left by a decedent at death, the tax would have been made payable by the estate alone in any event. The act, however, makes the transferee who received a transfer during the life of the decedent secondarily liable in certain circumstances and imposes a lien upon his property for the tax. No justification in reason exists for that course, if the only transfer taxed is that of the decedent's estate which takes place at his death. The donee of a gift in contemplation of death has no interest in the transfer of the decedent's estate, which is the sole source of the tax under the Government's theory, and he ought not, therefore, to have any responsibility therefor. To subject the donee to personal liability and his property to a lien for the payment of a tax due from the donor's estate upon the transfer of such estate at the

latter's death, as does the act in suit, is to make the donee pay the former owner's tax. Such a procedure is not the exercise of taxation at all (Cooley on Taxation, 7th ed., p. 695); it is plainly compelling one man to pay another's tax in respect of a matter in which he has no concern. The fact that the donee's property is the measure of the tax, even if it be true, is immaterial, for the Government's right to appropriate the donee's property certainly cannot result from using his property as a standard or measure of another's tax.

The Government's measurement theory necessarily presents grave constitutional objections. It is, of course, quite proper to measure a transfer tax by the value of the property transferred. There is in that case a reasonable relation between the tax and its measure, even though some of the property transferred be not taxable as such. *Keeney* v. *New York*, 222 U. S. 525, 534. In such a case a non-taxable element in the measure may be there merely incidentally and not because of any effort of the Government to tax it in effect and by indirection, or arbitrarily. If the latter were the case, the tax would be clearly void. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 163; *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295, 307; *Maxwell* v. *Bugbee*, 250 U. S. 525, 539-40; *Wallace* v. *Hines*, 253 U. S. 66, 68-70. To measure the tax upon the privilege of doing business in corporate form by the income derived from such business, even though part of that income springs from non-taxable securities, is justifiable; there is an obvious relation between the doing of business and the income of such business, and the non-taxables are not in that case being taxed in fact or by subterfuge. They relate to and benefit the business in-

directly, and are to an extent indirectly reflected in its income.

But to tax the transfer of the assets left by a decedent and to measure the tax, not merely by the value of those assets, but by the value also of what the decedent gave away in his lifetime, is quite a different matter. These prior transfers have no substantial relation to the transfer of the decedent's actual estate at death. They are distinct and disassociated transactions which took place perhaps many years before and with quite different parties. Their inclusion in the measure of the tax is thus not merely incidental to the application of an appropriate measure, but wholly arbitrary. It is, moreover, a covert attempt in effect to tax those past transfers, which cannot be done by unapportioned taxation. The case is, therefore, analogous to that of *Wallace* v. *Hines*, 253 U. S. 66, where an effort was made by a state in effect to tax interstate commerce under the guise of a tax upon local commerce measured in such a way as directly to reach interstate commerce. In condemning this attempt, the court said (pp. 68-70):

> "It will be seen that (the tax act) purports to be a special excise tax upon doing business in the State. As the law is administered, the tax commissioner fixes the value of the total property of each railroad by the total value of its stocks and bonds and assesses the proportion of this value that the main track mileage in North Dakota bears to the main track of the whole line. But on the allegations of the bill, which is all that we have before us, the circumstances are such as to make that mode of assessment indefensible. North Dakota is a state of plains, very different from the other states, and the cost of the roads there was

much less than it was in mountainous regions that the roads had to traverse. The State is mainly agricultural. Its markets are outside its boundaries and most of the distributing centers from which it purchases also are outside. It naturally follows that the great and very valuable terminals of the roads are in other States. So looking only to the physical track the injustice of assuming the value to be evenly distributed according to main track mileage is plain. But that is not all.

"The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the state. Therefore, no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state. Hence, the possession of bonds secured by mortgage of lands in other states, or of a land-grant in another state or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State. *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S. 350, 364. In this case, it is alleged, the tax commissioner's valuation included items of the kind described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and a taking of property without due process of law. *Fargo* v. *Hart*, 193 U. S. 490. *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 282."

There is no support for the Government's contention in the case of *Maxwell* v. *Bugbee*, 250 U. S. 525. The New Jersey taxing act there involved did not include in what it actually taxed any of the property of the non-resident decedent which was in other states. But in the case at bar, the Government seeks to have its measurement theory accomplish a very different result. It would add the value of the property transferred *inter vivos* to the value of that which passes at death (which it alleges is the only thing actually being taxed), and then, would not only fix the rate by the total, but also apply that rate to the total itself, that is, to the sum of all the transfers.

The difference between the New Jersey tax and the tax now before the court may be illustrated by the following example: A non-resident leaves property in New Jersey, not specifically disposed of, amounting to $50,000. There are other assets elsewhere, also not specifically disposed of, amounting to $950,000. The New Jersey taxing authorities compute what their tax would have been if the entire $1,000,000 had been located in New Jersey and the decedent had been a resident. The rate thus obtained—say, five per cent—is then applied only to the $50,000 assets actually located in New Jersey and the tax accordingly fixed at $2,500.

Let us contrast with the above the operation of the act of Congress of September 8, 1916, under the Government's measurement theory. A decedent dies possessed of assets amounting to $50,000. Fifteen years before his death he had transferred property amounting to $950,000, but reserved a life estate. The act of Congress adds the

two amounts together, makes a total net estate of $1,000,-000, and fixes the rate of the tax accordingly, at, say, five per cent. It would not, however, apply the five per cent rate solely to the assets possessed at death, but would apply it to the aggregate amount of $1,000,000, and fix the tax not at $2,500, but at $50,000. This indicates how oppressively the tax in suit might operate and how the tax liability of A's estate would be measured by the value of property belonging to third parties.

VII.

As to the power of Congress to levy taxes retroactively.

As has been shown in point II, the state courts have recognized that a transfer tax on past transfers is in substance and effect either a direct or property tax if imposed upon the transferee, or an unwarranted and arbitrary attempt to tax if imposed upon the transferor for having made a transfer long before the enactment of the tax statute. It is true that a limited measure of retroactivity in respect of certain taxes has been upheld because reasonable and practically necessary in view of the nature of certain particular taxes and their incidence. None of these taxes heretofore sustained have, however, involved any such unlimited retroactivity and reaching back into the past as that which the Government must here contend for. *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1; *Stockdale* v. *Insurance Companies*, 20 Wall. 323. As stated in Black's Income and Federal Tax Laws (sec. 56, p. 67):

> "On general principles and irrespective of explicit constitutional limitations, a statute imposing

an income tax may subject to taxation the income of the citizen for the whole of the current year in which the statute is passed, that is, not only so much of the income as accrued from the date of the enactment of the law to the end of the year, but also that portion which accrued or was earned from the beginning of the year to the date of the law. For the year's income is treated and considered as one entire thing, not as made up of several portions or items. And hence, although the statute might be called retrospective in its operation upon a part of the first year's income, it is not retrospective in such a sense as to render it unconstitutional."

This retroactive feature of the act of October 3, 1913 (38 Stat. 166), was characterized by Mr. Chief Justice White in *Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S. 1, 20, as "limited retroactivity."

The case at bar is not analagous to one in which a tax is imposed upon a continuing process or transaction, such as importations not yet completed, or holding tobacco for sale (*Patton* v. *Brady*, 184 U. S. 608), or using a foreign-built yacht (*Billings* v. *United States*, 232 U. S. 261). There is no necessary retroactivity in such cases, even though the process or transaction taxed was initiated or commenced at a time prior to the act. The process or transaction is still continuing and incomplete, and thus affords a basis for taxation.

Quite different, however, are taxes imposed, not for recurrent periods like an income tax, or on continuing processes or transactions like those just referred to, but upon the occurrence of a particular act or event. In such cases, if the act is not done or event does not occur after the tax is enacted or while it is in force, there is nothing upon which the tax can be incident. A past act or event

is a mere matter of history and not an occasion or occurrence upon which valid taxation may be imposed. "Where there is no transfer, there is no tax, and a transfer made before the passage of the act relating to taxable transfers is not affected by it" (*Matter of Lansing*, 182 N. Y. 238, 247).

Where state taxation has heretofore been involved, the courts, as we have seen above (point II), have regarded a tax upon a past transfer as void for want of due process of law, among other reasons. The basis of such a finding was that there was no transfer to tax, precisely to all intents and purposes as if a tax were imposed on property which no longer existed or which the taxpayer no longer owned. The inquiry, therefore, naturally arises, Why is not a federal tax upon a past transfer equally lacking in the element of due process of law? The federal power over successions or transfers at or because of death is certainly no larger than that of the states. Indeed, it was said by the minority in *Chanler* v. *Kelsey*, 205 U. S. 466, 479, and apparently not challenged by the members of the majority, that the power of the several states to tax such successions or transfers was at least as great as the power of the National Government. Certainly, the act or event or occasion is as much past and non-existent in the one case as in the other, and certainly the impairment and interference with antecedent vested rights is as far-reaching, objectionable and oppressive, whether it be the work of one of the several states or of the United States. *Choate* v. *Trapp*, 224 U. S. 665; *Osborn* v. *Nicholson*, 13 Wall. 654, 662. In other words, the fundamental arbitrariness of such an exertion of legislative power is the same, quite irrespec-

tive of whether it is an attempted exercise of legislative power by a state legislature or by Congress; and it would seem logically to follow that an attempt by Congress to tax a transfer as such when such transfer had been made and completed long before the taxing statute was passed, would constitute an attempt to tax something that had no present existence, and as such would be a violation of the Fifth Amendment, precisely as it would be a violation of the Fourteenth Amendment if enacted by a state legislature. Equally arbitrary, whether the tax was a state or a federal tax, would be the taxation of A's estate by reason of a long past transfer and measuring the tax thereon by the then value of the transferred property belonging to B, or taxing the transfer of the estate of A upon the basis of the then value of property belonging to B.

But it is asserted that it has been declared in opinions of this court that the Fifth Amendment does not in any way apply to the federal taxing power. Passing, for the moment, the expressions upon that point to be found in some of the opinions of this court, it is submitted that it is difficult to perceive any valid reason for such an extreme doctrine. It is true that the power to tax is broadly granted and that the degree or extent of its exercise in proper cases is within the discretion of Congress; but it is to be observed that the power is granted in and by the same instrument which contains the equally broad limitations upon all exercise of governmental powers; and it is well settled that:

> "The Constitution of the United States, with the several amendments thereof must be regarded as one instrument, all of whose provisions are to be deemed of equal validity, . . . [and that]

> it is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic laws of the Union that each and all shall be respected and observed" (*Prout* v. *Starr*, 188 U. S. 537, 543, 544).

Thus, the war power conferred upon the United States by the Constitution is as broadly granted as the taxing power and as essential; but it is, nevertheless, the established doctrine of this court that even the war power is subject to the guaranties contained in the Constitution, including those embraced in the Fifth Amendment. *Ex parte Milligan*, 4 Wall. 2, 121-7; *United States* v. *Russell*, 13 Wall. 623, 627; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 155, 156; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 88. If there were any power of the National Government which ought not to be subject to the operation of the guaranty in favor of due process of law, it would be natural to suppose that the exigent and highly essential war power would be that power. But, as the authorities cited above show, not even the apparent and imperative demands of war have been deemed sufficient warrant for placing the war power above the guaranty to the citizen of due process of law and the protection of his property against being taken for public use without just compensation.

Why, then, should the tax power be thus singled out and practically placed above the Constitution? It is not merely the power to destroy, but the power most likely to be abused if wholly unlimited. The Constitution, of course, does not provide that "the Congress shall have power to lay and collect taxes, duties, imposts, and excises without regard to the guaranty of due process of law or to the prohibition against taking private property

for public use without just compensation." Neither does the Fifth Amendment declare that "no person shall . . . be deprived of property, without due process of law, except in and by means of exactions called taxes, duties, imposts, or excises." Nor does the amendment provide that "private property shall not be taken for public use without just compensation, except under the claim of the exercise of the power to lay and collect taxes, duties, imposts and excises." It is manifest, therefore, that there is nothing in the text of the Constitution which requires the disregard of otherwise applicable guaranties intended as a protection against arbitrary exercises of power; and it is not to be assumed that any such effect was in the minds of the framers, familiar, as they were, with the influence and operation of oppressive and arbitrary taxation in welding the separate colonies into an independent nation, and familiar also with the apprehensions then entertained that the new national government, about to be formed, might, if not restricted by the then proposed constitutional amendments, in time, also transgress the bounds of just governmental authority.

It should also be borne in mind that this court has never upheld an arbitrary exercise of the federal taxing power, although it has declined to interfere with the discretion of Congress as to the degree or extent of taxation in permissible cases. If the exaction is really a tax and imposed upon or in respect of a taxable subject matter, then the extent or degree of the tax is not subject to review by the courts; but this conceded doctrine by no means prevents investigation as to the true nature and effect of the alleged tax. Carefully distinguishing *dicta* from the points actually decided, it will be found on

examination that every congressional tax sustained by this court was, in fact, an exercise of the power to tax and not a volation of any requirement of due process of law and that the real objection urged was as to the degree of the tax and some alleged collateral purpose sought to be accomplished thereby. In each case it was a tax upon a subject matter within the taxing power.

Even when it has been suggested that the federal taxing power was not subject to the limitations in the Fifth Amendment, the court disclaimed any intent to license arbitrary or unwarranted taxation by Congress. Thus, for example, in *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24, while the court declared that the due process clause "is not a limitation upon the taxing power conferred upon Congress by the Constitution," it, nevertheless, added that:

> "This doctrine would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

And in *Knowlton* v. *Moore*, 178 U. S. 41, 77, the court similarly declared that "aside from express constitutional restrictions," such arbitrary taxation would "transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

With all deference, it is submitted that, at least so far as the power of taxation in the case at bar is con-

cerned, those necessary guaranties against arbitrary and confiscatory taxation, which this court has thus recognized and affirmed, are fully embraced in the express prohibitions contained in the Fifth Amendment. In a word, the amendment condemns whatever exactions are not authorized by the taxing power granted in the Constitution. An unapportioned direct tax, for example, or an exaction or demand which is not in its nature a tax at all but an imposition on a selected class and arbitrarily measured, is but an attempt to take private property without due process of law and without just compensation. The limitations of the Fifth Amendment, as the First Congress stated in the preamble to the resolution which proposed the first ten amendments to the Constitution, were inserted "in order to prevent misconstruction or abuse of its powers," and for the purpose of adding "declaratory and restrictive clauses" (1 Stat. 97; Rev. Stat., p. 28, note). The express limitations in the Fifth Amendment are of themselves adequate to prevent the arbitrary exercise of power referred to in the foregoing extracts from the *Knowlton* and *Brushaber* cases, and it would, therefore, appear to be unnecessary to resort to any such implied limitations as are mentioned in the opinions in those cases.

It is further submitted that the applicability of the Fifth Amendment to the taxing power of Congress is not excluded by asserting that the Constitution does not in one clause withdraw a power which it confers in another. If that argument were valid, none of the powers granted to Congress in the Constitution would be in any way limited by the Fifth Amendment, and the war power, for example, would be entirely free of all the requirements

of due process of law—a contention which this court has repudiated. The Fifth Amendment comes into play, not as a restriction on the grant of power to tax, but as a prohibition upon the exercise of that power in a manner not intended to be authorized or under the guise or pretense of a tax. The grant to Congress of power to make war is obviously not withdrawn by the guaranty to the individual of due process of law in the exercise of the war power; but its exercise is directed to be in consonance with the private rights of the people so far as the circumstances will permit. In each instance, the grant and the limitation are given full force and each can be given due application and effect without nullifying the other.

It would certainly seem anomalous to hold, on the one hand, that Congress may lay and collect taxes without regard to the guaranties of due process of law and the taking of private property for public use without just compensation, and yet, on the other hand, hold that, nevertheless, if it shall attempt to exercise the power to tax without due process or just compensation some implied constitutional limitation will protect against the exercise of any such arbitrary power. The difference in opinion upon this score, it is submitted, would, in fact, be only one of mere words. Both views are, in final analysis, the same in practical effect and result. But it is submitted that the sounder view is that the express guaranties of the Fifth Amendment are in fact applicable and sufficient to prohibit unwarranted and arbitrary exactions, without recourse to general implications assumed to arise from the nature of our government.

If once it be concluded that the tax in suit in the case at bar is an unauthorized exaction under the guise of a tax, it should be as such plainly subject to the constitutional prohibitions against taking private property without due process of law, or for public use without just compensation, and it should follow that the act of September 8, 1916, offends against both guaranties. A state transfer tax upon a past transfer has, as we have seen (point II), been declared in violation of similar provisions in state constitutions and in the Fourteenth Amendment; and "if any different meaning of the same words, as they are used in the [Fifth and the] Fourteenth Amendment, can be conceived, none has yet appeared in judicial decision." *Twining* v. *New Jersey*, 211 U. S. 78, 100-1. See also *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 410, and *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 355.

CONCLUSION.

For the reasons above discussed, it is submitted that the Federal Estate Tax Law of September 8, 1916, should not be construed as intended to operate retroactively so as to tax a decedent's estate upon the present value of transfers made by him and vested in the transferees many years before the enactment of the tax law; but, if it should be so construed, that then it would constitute in substance and effect an unapportioned direct tax upon a decedent's estate, or else an arbitrary exaction under the guise of a tax, and in either of such aspects be un-

constitutional. The judgment of the court below was, therefore, erroneous and should be reversed.

Washington, D. C., April 10, 1922.

William D. Guthrie,
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Isaac Frohman,
Bernard Hershkopf,
Of counsel for plaintiffs-in-error.

Supreme Court of the United States

OCTOBER TERM, 1921

No. 236

UNION TRUST COMPANY OF SAN FRANCISCO and ALBERT LACHMAN, AS EXECUTORS OF HENRIETTE S. LACHMAN, DECEASED,

Plaintiffs-in-error,

v.

JUSTUS S. WARDELL, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF CALIFORNIA, ET AL.,

Defendants-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

APPENDIX TO BRIEF ON BEHALF OF THE PLAINTIFFS-IN-ERROR.

INDEX

APPENDIX.

PROVISIONS OF THE ESTATE TAX ACTS OF 1916, 1917 AND 1919.

Estate Tax Law of 1916 (Revenue Act of 1916, Title II, 39 Stat. 777).

Sec. 200. That when used in this title—

The term "person" includes partnerships, corporations, and associations;

The term "United States" means only the States, the Territories of Alaska and Hawaii, and the District of Columbia;

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue at Baltimore, Maryland.

Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages

of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

One per centum of the amount of such net estate not in excess of $50,000;

Two per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

Three per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

Four per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000;

Five per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;

Six per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000;

Seven per centum of the amount by which such net estate exceed $2,000,000 and does not exceed $3,000,000;

Eight per centum of the amount by which such net estate exceeds $3,000,000 and does not exceeed $4,000,000;

Nine per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000; and

Ten per centum of the amount by which such net estate exceeds $5,000,000.

Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is

subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

For the purpose of this title stock in a domestic corporation owned and held by a non-resident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate, arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000;

(b) In the case of a non-resident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States that proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated. But no deductions shall be allowed in the case of a non-resident unless the executor includes in the return required to be filed under section two hundred and five the value at the time of his death of that part of the gross estate of the non-resident not situated in the United States.

Section 204. That the tax shall be due one year after the decedent's death. If the tax is paid before it is due a discount at the rate of five per centum per annum,

calculated from the time payment is made to the date when the tax is due, shall be deducted. If the tax is not paid within ninety days after it is due interest at the rate of ten per centum per annum from the time of the decedent's death shall be added as part of the tax, unless because of claims against the estate, necessary litigation, or other unavoidable delay the collector finds that the tax cannot be determined, in which case the interest shall be at the rate of six per centum per annum from the time of the decedent's death until the cause of such delay is removed, and thereafter at the rate of ten per centum per annum. Litigation to defeat the payment of the tax shall not be deemed necessary litigation.

Sec. 205. That the executor, within thirty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by the regulations made under this title, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a non-resident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section two hundred and three (c) the value of the net estate of the decedent as defined in section two hundred and three; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases of estate subject to the tax or where the gross estate at the death of the

decedent exceeds $60,000, and in the case of the estate of every non-resident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner of Internal Revenue shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

Sec. 206. That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section two hundred and five, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner of Internal Revenue shall assess the tax thereon.

Sec. 207. That the executor shall pay the tax to the collector or deputy collector. If for any reason the amount of the tax cannot be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner of Internal Revenue shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid the commissioner shall notify the executor of the amount of such excess. From the time of such

notification to the time of the final payment of such excess part of the tax, interest shall be added thereto at the rate of ten per centum per annum, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

Sec. 208. That if the tax herein imposed is not paid within sixty days after it is due, the collector shall, unless there is reasonable cause for further delay, commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose

interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

Sec. 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

Sec. 210. That whoever knowingly makes any false statement in any notice or return required to be filed by this title shall be liable to a penalty of not exceeding

$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Whoever fails to comply with any duty imposed upon him by section two hundred and five, or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, fails to exhibit the same upon request to the Commissioner of Internal Revenue or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding $500, to be recovered, with costs of suit, in a civil action in the name of the United States.

Sec. 211. That all administrative, special and general provisions of law, including the laws in relation to the assessment and collection of taxes, not heretofore specifically repealed are hereby made to apply to this title so far as applicable and not inconsistent with its provisions.

Sec. 212. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make such regulations, and prescribe and require the use of such books and forms, as he may deem necessary to carry out the provisions of this title.

Amendment to Estate Tax Law of 1916 by Act of March 3, 1917 (39 Stat. 1002).

Sec. 300. That section two hundred and one, Title II, of the Act entitled "An Act to increase the revenue, and for other purposes", approved September eighth, nineteen hundred and sixteen, be, and the same is hereby, amended to read as follows:

Section 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

[Here following rates of taxation.]

Sec. 301. That the tax on the transfer of the net estate of decedents dying between September eighth, nineteen hundred and sixteen, and the passage of this Act shall be computed at the rates originally prescribed in the Act approved September eighth, nineteen hundred and sixteen.

Estate Tax Law of 1917 (40 Stat. 324).

Sec. 900. That in addition to the tax imposed by section two hundred and one of the Act entitled "An Act to increase the revenue, and for other purposes," approved September eighth, nineteen hundred and sixteen, as amended—

(a) A tax equal to the following percentages of its value is hereby imposed upon the transfer of each net estate of every decedent dying after the passage of this Act, the transfer of which is taxable under such section (the value of such net estate to be determined as provided in Title II of such Act of September eighth, nineteen hundred and sixteen):

[Here follow rates of taxation.]

Sec. 901. That the tax imposed by this title shall not apply to the transfer of the net estate of any decedent

dying while serving in the military or naval forces of the United States, during the continuance of the war in which the United States is now engaged, or if death results from injuries received or disease contracted in such service, within one year after the termination of such war. For the purposes of this section the termination of the war shall be evidenced by the proclamation of the President.

ESTATE TAX LAW OF 1919 (REVENUE ACT OF FEB. 24, 1919, TITLE IV, 40 STAT. 1057, 1096).

SEC. 400. That when used in this title—

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue of such district as may be designated by the Commissioner.

SEC. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage

of this Act, whether a resident or non-resident of the United States:

[Here follow rates of taxation.]

The taxes imposed by this title or by Title II of the Revenue Act of 1916 (as amended by the Act entitled "An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes," approved March 3, 1917) or by Title IX of the Revenue Act of 1917, shall not apply to the transfer of the net estate of any decedent who has died or may die while serving in the military or naval forces of the United States in the present war or from injuries received or disease contracted while in such service, and any such tax collected upon such transfer shall be refunded to the executor.

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with r-

spect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Sec. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, or from theft, when such losses are not compensated for by insurance or otherwise, and such amounts reasonably required and actually expended for the support during the settlement of the estate of those dependent upon the decedent, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, but not including any income taxes upon income received after the death of the decedent, or any estate, succession, legacy, or inheritance taxes;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in the decedent's gross estate;

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to

or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

(4) An exemption of $50,000;

(b) In the case of a non-resident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States—

(1) That proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated, but in no case shall the amount so deducted exceed 10 per centum of the value of that part of his gross estate which at the time of his death is situated in the United States;

(2) An amount equal to the value at the time of the decedent's death of any property, real, personal, or mixed, which can be identified as having been received by the decedent as a share in the estate of any person who died within five years prior to the death of the decedent, or which can be identified as having been acquired by the decedent in exchange for property so received, if an estate tax under the Revenue Act of 1917 or under this Act was collected from such estate, and if such property is included in that part of the decedent's gross estate which at the time of his death is situated in the United States; and

(3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any domestic corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, sicentific, literary, or educational purposes within the United States. This deduction shall be made in case of the estates of all decedents who have died since December 31, 1917; and

No deduction shall be allowed in the case of a non-resident unless the executor includes in the return required to be filed under section 404 the value at the time of his death of that part of the gross estate of the non-resident not situated in the United States.

For the purpose of this title stock in a domestic corporation owned and held by a non-resident decedent, and the amount receivable as insurance upon the life of a non-resident decedent where the insurer is a domestic corporation, shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (c) of section 402, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

In the case of any estate in respect to which the tax under existing law has been paid, if necessary to allow the benefit of the deduction under paragraph (3) of subdivision (a) or (b) the tax shall be redetermined and any excess of tax paid shall be refunded to the executor.

Sec. 404. That the executor, within sixty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a non-resident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section 403; (c) the value of the net estate of the decedent as defined in section 403; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases where the gross estate at the death of the decedent exceeds $50,000, and in the case of the estate of every non-resident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner shall make all assess-

ments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

Sec. 405. That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section 404, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner shall assess the tax thereon.

Sec. 406. That the tax shall be due one year after the decedent's death; but in any case where the Commissioner finds that payment of the tax within one year after the decedent's death would impose undue hardship upon the estate, he may grant an extension of time for the payment of the tax for a period not to exceed three years from the due date. If the tax is not paid within one year and 180 days after the decedent's death, interest at the rate of 6 per centum per annum from the expiration of one year after the decedent's death shall be added as part of the tax.

Sec. 407. That the executor shall pay the tax to the collector or deputy collector. If the amount of the tax can not be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid, the collector shall notify the executor of the amount of such excess and demand payment thereof. If such excess part of the tax is not paid

within thirty days after such notification, interest shall be added thereto at the rate of 10 per centum per annum from the expiration of such thirty days' period until paid, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

Sec. 408. That if the tax herein imposed is not paid within 180 days after it is due, the collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.

If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have

been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

Sec. 409. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bone fide sale for a fair consideration in money or money's worth) or

(b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

Sec. 410. That whoever knowingly makes any false statement in any notice or return required to be filed under this title shall be liable to a penalty of not exceeding $5,000, or imprisonment not to exceed one year, or both.

Whoever fails to comply with any duty imposed upon him by section 404, or, having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, or, having in his possession or control any property comprised in the gross estate of the decedent, fails to exhibit the same upon request to the Commissioner or any collector or law officer of the United States, or his duly authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding $500, to be recovered, with costs of suit, in a civil action in the name of the United States.